

# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-179

November 1987

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**The Army Lawyer (ISSN 0364-1287)**

**Editor**

**Captain David R. Getz**

*The Army Lawyer* is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform*

*System of Citation* (14th ed. 1986) and the *Uniform System of Military Citation* (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as *The Army Lawyer*, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.



DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, DC 20310-2200



REPLY TO  
ATTENTION OF

JAGS-GRA

24 September 1987

MEMORANDUM FOR:

STAFF AND COMMAND JUDGE ADVOCATES  
SUPERVISORS OF INDIVIDUAL MOBILIZATION AUGMENTEES

SUBJECT: Individual Mobilization Augmentee, Individual Duty Training - Policy  
Memo 87-6

1. Individual Mobilization Augmentees (IMA) occupy critical positions in our Mobilization Table of Distribution and Allowances (MOBTDA). The IMA program is designed to ensure that upon mobilization a trained judge advocate will occupy each MOBTDA IMA position. Judge advocate activities should maximize IMA training to achieve this goal.
2. Each IMA is required to perform twelve days annual training, exclusive of travel time, each fiscal year. The primary objective of this training is to attain the highest possible degree of qualification in the specific duties and functions which the IMA will perform upon mobilization.
3. To maximize training of each IMA you should -
  - a. Ensure at least quarterly contact with your IMA;
  - b. Keep each IMA informed of new developments in the law; and
  - c. Afford each IMA innovative opportunities to earn inactive duty retirement points (up to 45 annually). Some ideas are:
    - Professional reading periods
    - Research and writing assignments
    - Review of investigations
    - Consultations
    - Recruiting assistance
4. The article "Management of Your IMAs," in The Army Lawyer, June 1987, at 52, contains valuable information on the IMA program. Proper training of our IMAs is your responsibility. Please give this your personal attention.

*Hugh Overholt*

HUGH R. OVERHOLT  
Major General, USA  
The Judge Advocate General



DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, DC 20310-2200



02 OCT 1987

REPLY TO  
ATTENTION OF  
DAJA-LA (27-3c)

MEMORANDUM FOR: COMMAND AND STAFF JUDGE ADVOCATES

SUBJECT: The Chief of Staff's Award for Excellence in Legal Assistance

1. This memorandum announces the 1987 competition for "The Chief of Staff's Award for Excellence in Legal Assistance."
2. The award was established in 1986 to recognize commands with the best legal assistance and preventive law programs in the Army. While judge advocates oversee these programs, they are the responsibility of installation and organization commanders. The award honors those commands that have committed their legal resources to help our soldiers and their families with their personal legal problems.
3. Categories. The following new categories have been established this year:
  - a) Large Office. Those Judge Advocate offices which have fifteen (15) or more attorneys.
  - b) Medium office. Those Judge Advocate offices which have from three (3) to fourteen (14) attorneys.
  - c) Small office. Those Judge Advocate offices which have one or two attorneys assigned and generally perform legal assistance on a part time or limited basis.

In those areas where a large office has established geographic branch offices, the commander can elect to have the whole organization compete as one or as separate units, e.g., the 3d AD can compete as a whole or the Gelhausen branch office can compete by itself. They can not compete in more than one category.
4. Nominations. Nominations for the award will be submitted in military memorandum format, signed by the nominating commander to HQDA (DAJA-LA), Washington, DC 20310-2200. Nominations should be received no later than 1 February 1988. Entries should address accomplishments for calendar year 1987 and will indicate the number of military and civilian attorneys authorized for the entire office and the number of attorneys working in legal assistance.



DAJA-LA (27-3c)

SUBJECT: The Chief of Staff's Award for Excellence in Legal Assistance

5. Criteria. The following criteria will be considered when evaluating nominations:

a. The extent and quality of the nominee's legal assistance and preventive law programs.

b. Responsiveness to clients' needs.

c. Professionalism of attorneys and supporting personnel.

d. Use of legal specialists and noncommissioned officers.

e. Office environment (professional atmosphere, automation, etc.)

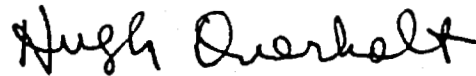
f. Innovations that will benefit the Legal Assistance and Preventive Law Programs.

g. Statistics may be submitted but workload will not be the sole factor in evaluating a nomination.

h. Exhibits consisting of examples of programs that will assist the judges evaluating the entries and other information that would be helpful to other legal assistance offices can be submitted.

6. Evaluation. The Judge Advocate General will appoint a board to evaluate nominations. Board membership will include the Assistant Judge Advocate General for Military Law, as President, the Chief, Legal Assistance Office, OTJAG, the Chief, Legal Assistance Branch, TJAGSA, one company grade judge advocate officer, and one legal specialist, or NCO as members. The President will submit the board's recommendations in each category to The Judge Advocate General for selection of the winners.

7. Announcement of Awards. The winners of the competition will be announced immediately upon selection and the awards will be presented to the commanders by The Judge Advocate General or his representative.



HUGH R. OVERHOLT  
Major General, USA  
The Judge Advocate General



DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, DC 20310-2200



REPLY TO  
ATTENTION OF

DAJA-ZX

29 September 1987

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Innovation Update

1. Attached for your information and consideration is a list of some of the innovative programs which judge advocates have instituted this year.

2. It is apparent that we are more actively involved in installation activities than a few years ago. Aggressive information campaigns and innovative leadership are paying tremendous dividends to the Corps.

3. Congratulations to each of you.

*Hugh Overholt*

Attachment

HUGH R. OVERHOLT  
Major General, USA  
The Judge Advocate General

## **Innovative Programs Listing**

1. Developed a computer based bulletin board using IBM modum hook-ups. Accessible through modem dial-up on AV or commercial lines. System can be used to send messages to groups or individuals or to make general announcements.
2. Developed a preventive law instruction program with a detailed desk book for commanders.
3. Developed 1-2 day conference entitled "Contract Year in Review." Conference discussed current policies, regulations and court decisions affecting the contracting arena.
4. Developed a mobile area-wide legal assistance program. A legal assistance attorney and clerk travel to MEPS and Recruiting Battalions. They use a portable PC with the LAAWS will and Power of Attorney programs.
5. Developed a generic instruction letter for divorcees seeking support so they can write the initial letter seeking assistance from the soldier's commander.
6. Developed a program wherein an attorney and paralegal interview all AIDS patients to determine needed services for their special circumstances.
7. Physically placed a contract attorney in the Purchasing and Contracting Office, thereby improving services to installation.
8. Developed a program in which a LAO and Chaplain conduct classes on legal implications of marriage and estate planning.
9. Developed a senior officer legal check-up program--All O5s and above are individually contacted and offered legal review of their personal affairs.
10. Instituted a monthly information bulletin covering the entire spectrum of contract law related issues.
11. Developed a training support package on the Constitution for use during Bicentennial celebrations.
12. Developed a local regulation on fraud, waste, and abuse prevention and created a 40-cell matrix identifying areas which should be monitored.
13. Developed a standard government quarters cleaning contract which enables personnel vacating government quarters to expedite their moves.
14. Developed a mock trial program which allows senior NCO's and junior officers to prosecute/defend cases before a military judge.
15. Developed a Senior Officer Legal Affairs Review (SOLAR) and extended it to spouses.
16. Developed a local guide for battalion legal specialists.
17. Program developed to prepare pro se pleadings in state court saved soldiers \$95,000 in legal expenses during the first six months of its operation.
18. Developed a risk management program with commissary which reduced government liability related to on-premises accidents.
19. Established a separate tax assistance office with an outside entrance which greatly reduced traffic in the legal assistance office and made access easier for clients.
20. Installed direct telephone line between claims division and transportation office reducing response time and greatly improving office efficiency.
21. Gained access to installation information management system through criminal law branch computers which ensured 24 hours access to personnel and locator files.
22. Developed a household goods predelivery briefing packet for incoming personnel.
23. Instituted a program wherein the SJA attends Landlord Association meetings to assist and educate local landlords.
24. Drafted legislation which was passed by state legislature requiring "military" clauses in all residential leases.
25. Established a program of electronic filing of income tax returns.
26. Published bilingual household goods claims processing packet (English/Spanish).
27. Eliminated requirement to submit claims forms in triplicate, thereby easing burden on claimants.
28. Developed community council system where JAG officers are assigned as hearing officers to hear minor disputes between community personnel, make factual determinations, and submit recommendations to the installation commander.
29. Established a point of contact (POC) program in which all base activities are assigned a POC in SJA office to act as their JAG liaison, regardless of subject matter of problem.

30. Developed community information shorts for AFN television and radio to publicize the Commander's Preventive Law Program.
31. Developed "team approach" to writing and reviewing Performance Work Statements in commercial activities arena. (Team consists of an officer from OSJA and member from Directorates of Resource Management, Logistics, and whichever directorate is being studied.)
32. Developed inprocessing briefing for all personnel covering available legal services, local consumer affairs problems, criminal jurisdiction under NATO-SOFA, and local laws and customs.
33. Developed automated system that can generate necessary documents to facilitate pro se adoptions, guardianships, change of custody, divorces, orders for garnishment, admit wills to probate, and petitions for administration of small estates, each in less than 30 minutes.
34. Negotiated a contract with the state under which it will analyze all blood, breath, and urine samples, withdrawn pursuant to DUI arrest, for only \$32 per sample. Under the contract, state provides: expert testimony if case goes to trial; new CMI 5000 Intoxilyzer at no cost; and trains and certifies all law enforcement personnel on the instrument.
35. Developed automated indexing system for access to prior office opinions and research.
36. Developed program in which a LAO is notified by the AG's office of all incoming officers and senior NCO's. These personnel are personally contacted by a LAO and advised of the services available at the legal assistance office.
37. Sponsored an Immigration and Naturalization Day, in conjunction with Law Day activities. Resulted in nearly 500 new citizens being sworn in by a Federal District Judge. That judge had undergone basic training at the installation 47 years earlier.
38. Developed plan whereby installation cable television franchising authority was delegated to the Installation Morale Welfare Recreation Fund (IMWRF). Anticipated yearly revenues for IMWRF is \$150,000.
39. Developed program whereby representatives from the Social Security Administration were invited to post for two-day session of processing applications for taxpayers ID numbers for children 5 years of age and older.
40. Developed a seminar entitled "Smooth Move" for all soldiers receiving PCS orders. Explains entitlements and suggestions to avoid problems associated with moving.



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WASHINGTON, DC 20310-2200



REPLY TO  
ATTENTION OF

DAJA-ZX

24 September 1987

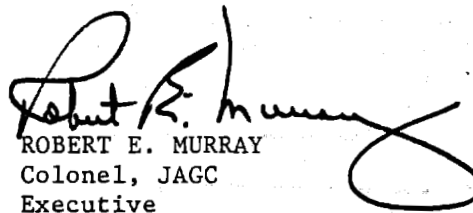
MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Updated Special Interest Items for Article 6 Inspections

Attached for your information and use is a revised Article 6 inspection checklist. This list replaces the 24 October 1986 list and will be updated annually.

FOR THE JUDGE ADVOCATE GENERAL:

Attachment

  
ROBERT E. MURRAY  
Colonel, JAGC  
Executive

## Special Interest Items for Article 6 Inspections\*

### 1. GENERAL AREAS FOR INQUIRY.

- a. Office appearance and morale. Adequacy of facilities.
- b. Relations with commander(s) and staff and legal counterparts (if any), higher headquarters (incl OTJAG) and subordinate commands.
- \*c. SJA objectives for coming 12 months and accomplishments during last year.
- d. Personnel status (officer, civilian, enlisted): authorizations filled? Critical losses identified to PT or other appropriate office?
- e. Relations with the media. Do judge advocates and other personnel understand the rules?
- f. Positive and negative trends in functional areas.
- \*g. Is the office engaged in any non-JAG missions? If so, what are they and who directed JAG participation?
- h. Is there a program designed to brief those leaving service as to their post-employment restrictions?
- i. Does the office have a plan for professional development of all personnel? Is budget consideration given for personnel to attend career enhancing conferences or training?
- j. Status of relations with local officials, including the local bar?
- \*k. Condition of library and library holdings? Are excess ALLS-purchased library materials identified and reported to ALLS?
  - l. Is the office doing something new and innovative in support of the Family Action Plan?
- m. Does the office have a current, functional SOP?
- n. Does the office have a plan for premobilization legal counseling?
- o. What provision has the office made for mobilization and deployment plans pertaining to Military Law Centers and JA sections?
- p. Does the SJA office or the command have a Defense Technical Information Center account?
- q. Enlisted Considerations.
  - (1) Who manages local assignments--AG or SJA?
- \* (2) Is there a sponsorship program for incoming personnel?
- (3) Are there shortages? If so, why?
- \* (4) Are enlisted personnel being crossed-trained?
- \* (5) Is there a SQT training program for legal specialists and court reporters?
- r. What are office policies for sponsoring and developing summer interns?
- \*s. Has the SJA been tasked by his MACOM or installation to provide input on actions which may impact upon JAGC force structure manpower such as officer and warrant officer scrubs?
- \*t. Does the SJA have automated packages in any or all functional areas to share with TJAGSA for possible incorporation into an expanded LAAWS STAMMIS?
- \*u. Does the SJA encourage subordinates to write for publication?

### 2. INTRODUCTORY PROGRAM FOR NEWLY ASSIGNED JA'S.

- \*a. Is there an effective sponsorship program for incoming personnel?
- \*b. Does SJA office have an orientation program?
- c. Do new JA's spend time with troop units?

### 3. PHYSICAL FITNESS AND WEIGHT CONTROL.

- a. Does SJA office have a regular PT program?
- b. Have personnel over 40 been medically screened?
- c. When was last PT test? Did all personnel participate?
- d. Are overweight personnel in a medically supervised weight control program?
- e. Are personnel professional in appearance? Uniform? Grooming?
- f. See also, Item 7, DA MANDATED TRAINING.

### 4. LEGAL ASSISTANCE.

- a. Is there a viable, aggressive preventive law program?
- b. Are offices attractive and professional? Sufficient privacy?
- c. Are experienced officers assigned. Are any members of local bar?
- d. How does the SJA determine client satisfaction?
- e. Are legal services publicized?
- f. Are soldiers getting legal assistance for OER/EER appeals? Is there any significant manpower impact from this requirement?
- g. How does the office handle circumstances in which both spouses seek representation in domestic relations matters?
- \*h. Army Tax Assistance Program. What is the SJA doing to improve tax assistance for soldiers? Are legal specialists being used where appropriate?
- i. What is the waiting time for an appointment? For a will, separation agreement, or power of attorney?
- j. Is there an in-court representation program? Pro se assistance?
- k. How has the office been innovative?
- \*l. How do LAOs interact with local civilian organizations?

\*Indicates material that has been modified or added.

5. CLAIMS. (AR 27-20; Policy Letters 86-10 and 87-2)

a. Are experienced officers assigned as claims judge advocates? How long are they stabilized in a claims assignment?

b. Does the claims office staffing indicate requisite support of claims mission? Are claims personnel sufficiently trained? Which, if any, have attended USARCS-sponsored workshops?

\*c. Are adequate travel funds provided for: investigations and negotiations with civilian attorneys; expert opinions; and, if possible, an NCO investigator?

\*d. Is the staff judge advocate familiar with and taking a personal interest in the computerization effort of the claims office? Is the software working well?

\*e. Is there a mechanism in effect to ensure prompt reporting and investigation of all potential claims incidents within the assigned area of responsibility?

f. Are judge advocates or claims attorneys personally investigating actual or potential tort claims over \$25,000? Is USARCS immediately notified of all claims over \$15,000? Is there continuing coordination with USARCS on these claims?

g. What is the relationship with the MEDDAC? Is the SJA office involved in the Risk Management Program? Is there an MOU with the MEDDAC?

\*h. Has the Area Claims Office (ACO) established liaison with claims processing offices? Are claims processing offices forwarding files to the ACO for action?

\*i. Is the senior attorney or SJA personally taking actions on all final action, e.g., denials and final offers?

\*j. Within CONUS, are there adequate publications on local law and verdicts relating to tort claims within the area of that office's jurisdiction?

k. How much was recovered in medical care recovery and property damage claims last year? Is a judge advocate assigned to and actively managing the recovery program?

l. Are small claims procedures being used?

m. What is average processing time for payment of personnel claims.

6. LABOR COUNSELOR PROGRAM. (Policy Letter 85-3)

\*a. Is the labor counselor position occupied by an experienced judge advocate or civilian attorney?

b. Has the Labor Counselor had sufficient training?

c. Are library assets adequate?

d. Is the labor counselor position either civilianized or occupied by an experienced judge advocate?

e. How long do judge advocates remain in the position of labor counselor prior to being rotated to other positions with the SJA Office?

f. Do the labor counselor and the SJA have a close working relationship with the Civilian Personnel Officer? With the Equal Employment Opportunity Officer?

7. DA MANDATED TRAINING.

\*a. Do OSJA personnel participate in required training such as physical training, weapons qualification, common task training, and NEC training?

\*b. Are military judges and TDS personnel invited to participate with OSJA? Do they?

8. TERRORIST THREAT TRAINING. (Policy Letter 85-5)

a. Are personnel properly trained in legal aspects of countering terrorist threats?

b. As a minimum, do all personnel have a working knowledge of AR 190-52, TC 19-16, and the MOU between DOD, DOJ, and FBI on use of Federal military force in domestic terrorist incidents?

\*c. Is a judge advocate on the Crisis Management Team (AR 190-52)?

\*d. Are rules on the use of force reviewed by a judge advocate?

9. RESERVE JUDGE ADVOCATE TRAINING. (Policy Memo 87-8)

a. Does the office train JAGSO units? If so, what training schedule do they use?

b. Are IMA's assigned to the office? Are there vacancies? What management plan is used to scheduled ADT, keep the IMA's informed of office developments, and assist them in getting required retirement points?

c. What kind of working relationship does the SJA have with the appropriate Army SJA in his area?

d. Does the office participate in On-Site Reserve instruction?

10. RECRUITING FOR THE RESERVE COMPONENTS. (Policy Letter 86-5)

a. Does the SJA have a program to identify quality legal specialists and court reporters for service with the Reserve Components?

b. Is information about these soldiers being forwarded to the OTJAG Senior Staff NCO?

c. Does the SJA encourage quality judge advocates and legal MOS enlisted soldiers to join a Reserve Component? Is TJAGSA Guard and Reserve Affairs Department notified when a quality judge advocate expresses an interest in joining a Reserve Component?

11. AUTOMATION. (Policy Letter 85-4)

a. Who is the automation manager?

b. What are the automation needs?

c. What is the plan to satisfy these needs?

d. What is the current status?

12. STANDARDS OF CONDUCT. (AR 600-50)

a. Does the SJA office have a designated Ethics Counselor?

b. Is there an active discussion with GO and SES personnel concerning their SF 278s?

c. Are the 278s reviewed with each GO at the time they are first assigned to the command or assume a new duty position in the command?

d. Is there an active standards of conduct training program?

\*e. Are the SJA and Ethics Counselor familiar with the filing requirements for 278s, 1555s, and 1787s.

f. Does the SJA have a firm grasp on the proper approach to take if local senior personnel (including the CG) are alleged to have committed violations of the standards of conduct?

### 13. INTELLIGENCE OVERSIGHT.

a. Is the SJA aware of the mission, organization, and function of intelligence units within his jurisdiction?

b. Does the office maintain a library of current intelligence directives and regulations?

c. Have intelligence oversight attorneys received INSCOM-sponsored training on intelligence law topics and oversight responsibilities? Do they have the necessary security clearances.

### 14. MILITARY JUSTICE.

\*a. Are appropriate confinement and finance and accounting offices being notified by electronic message within 24 hours of convening authority action IAW paragraph 5-27, AR 27-10?

\*b. Has an active victim/witness assistance program been developed and implemented? If implemented, what is SJA's impression of program effectiveness?

\*c. Is the jurisdiction experiencing any problems with requests for civilian and overseas witnesses? Are requests from overseas commands for civilian witnesses from CONUS made within time and format requirements of paragraph 18-16.1b, AR 27-10?

d. Are rates for Article 15s and courts-martial, and courts-martial processing times comparable to area command and Army-wide rates?

e. Does a mutual support agreement exist between the SJA and TDS, in which responsibility for Priority III duties is clearly defined? Is it working?

f. How are relations between OSJA, TDS, and Trial Judges?

g. What efforts are being made to ensure that JA personnel are involved in the criminal justice process at early stages?

\*h. "What special procedures, if any, have been initiated (or do you believe should be initiated) for the prosecution of child abuse cases (e.g., those pertaining to initial interviews of witnesses and victim by law enforcement personnel and attorneys, conduct of medical examinations, counseling for victim and family, marshaling and presentation of evidence?"

\*i. Do commanders at all levels receive adequate instruction regarding military justice duties, especially avoidance of unlawful command influence and the potential for restriction tantamount to arrest or confinement to trigger the speedy trial clock?

j. Do court facilities (courtroom, deliberation room, witness waiting rooms and judge's chamber) meet professional standards?

\*k. Is there an active trial advocacy training program for new counsel? Are they observed, in court, by the Chief of Military Justice?

\*l. In light of Solorio, are criminal investigations for crimes committed off-post in CONUS being coordinated with civilian authorities?

\*m. Are the Army Rules of Professional Responsibility being taught?

\*n. Is there an active military justice education program for commanders, soldiers and civilian authorities which emphasizes the fairness of our system?

\*o. Is there a POC for questions concerning Reserve Component jurisdiction?

### 15. TRIAL COUNSEL ASSISTANCE PROGRAM.

a. Are trial counsel using the services of the Trial Counsel Assistance Program?

\*b. Did the Chief of Military Justice attend both TCAP seminars within the region? Does each trial counsel attend at least one of these seminars?

c. Are trial counsel satisfied with the assistance rendered by the Trial Counsel Assistance Program?

\*d. Are trial counsel receiving TCAP memoranda and other literature? Do they have a copy of the TCAP Advocacy Deskbook? Is it used?

### 16. LITIGATION.

a. What is being done to foster close relationships with U.S. Attorneys?

b. Is the office having any problems with the U.S. Attorneys's office?

c. What kind of relationship does the office have with the Magistrate's Court?

d. What support is given the local hospital activity in litigation matters, medical malpractice questions, and quality assurance/risk management issues?

e. Any jurisdictional problems on post?

f. What type of contact has the office had with local authorities concerning child abuse and spouse abuse cases?

g. Is the office sensitive to the requirement for detailed, complete investigative reports in all cases in litigation (IAW AR 27-40)?

h. Does the office promote active participation of local counsel in the prosecution and resolution of cases in litigation?

i. Does the SJA office take an active role in the disposition of administrative complaints in areas such as Civilian Personnel and Equal Employment Opportunity law?

### 17. CONTRACT LAW.

a. To what extent is nature of legal work in SJA office shifting from military justice to civil law areas such as acquisition, environmental, litigation, etc?

b. What activities at the installation are facing commercial activities review? (Contracting out a major activity such as DEH may require the usual contracts lawyer to work full time on the CA project for an extended period.)

(1) Is the SJA comfortable that adequate legal support is available?



- (2) Is the SJA prepared to discuss contract types with his commander?
- c. Has the SJA visited the contracting office? Is at least one lawyer designated and trained to provide installation contracting support? Does the contracting officer know who his lawyer is? Does the contracting officer view "his" lawyer as part of the contracting team or merely another obstacle to be overcome?
- d. Is the installation anticipating any significant procurement of ADP equipment within the coming year?
- e. How is the Acquisition Law Specialty program viewed by the SJA and other JAs? What interest is expressed in the specialty? The LL.M. Program?
- f. Is the SJA involved in acquisition issues?
- g. How closely does the SJA monitor acquisition law advice?
- h. Has the acquisition portion of the mobilization plan been reviewed?
- i. What acquisition law advice is planned for predeployment and deployment?
- j. What training by members of the SJA office has been given (is planned) for members of the command concerning irregular acquisitions and fiscal law matters?
- k. How many contracts, and what percentage of annual contract dollars, were awarded during the last quarter of the fiscal year? Could any have been awarded earlier with advance planning?
- l. How many contracts were awarded during the past quarter and past fiscal year other than by full and open competition? What percentage of total contracts awarded and total contract dollars were involved in these awards?
- m. How many bid protests were filed during the past quarter and past fiscal year? How many were sustained? What issues were involved and what remedial measures were taken? To what extent was the SJA consulted and involved?
- n. How many contract claims were filed during the past quarter and past fiscal year? What issues were involved and what, if any, remedial measures were taken? To what extent was the SJA consulted and involved?
- o. How many contracting officers' final decisions were issued during the past quarter and past fiscal year? What issues were involved? How many were appealed to the ASBCA or Claims Court? To what extent was the SJA consulted and involved?
- p. What is the general attitude of the command group and staff concerning acquisition law issues? What actions has the SJA taken to foster sensitivity to acquisition law issues?
18. ENVIRONMENTAL LAW.
  - a. Has the SJA appointed an Environmental Law Specialist? Are there any on-going violations of federal or state environmental laws?
  - b. How is the SJA associated with environmental personnel to make sure legal consideration is given to all environmental related projects?
  - \*c. Does the Environmental Law Specialist play a proactive role in the installation environmental compliance organizational structure?
19. TRIAL DEFENSE SERVICE.
  - \*a. Are offices attractive and professional? Is there sufficient privacy?
  - \*b. Is office properly equipped and receiving sufficient administrative support?
  - \*c. Are experienced officers rotated from the SJA office into TDS?
  - \*d. Do TDS personnel have access to local training funds for civilian CLE?
20. MILITARY JUDGES.
  - a. Is SJA support adequate?
  - b. Is an effort being made to enhance professional development?
21. INTERNATIONAL AND OPERATIONAL LAW
  - \*a. Has the OSJA established an active OPLAW program?
    - (1) Have attorney(s) within the office received training in OPLAW, and has an attorney specifically been designated to address OPLAW?
    - (2) Is the office actively involved in reviewing OPLANs?
      - (a) Are OPLANs reviewed from an overall OPLAW perspective, i.e., not from just a Law of War perspective?
      - (b) Do designated OPLAW attorneys possess the security clearances necessary to enable them to review OPLANs and other relevant documents?
    - (3) Do OPLAW attorneys have access to the Tactical Operations Center (TOC)?
    - (4) Have OPLAW attorneys established effective working relationships with key staff members?
  - b. Is there a program to support TRADOC and MACOM requirements for training regarding Geneva and Hague Conventions?
    - (1) Does the SJA take a personal interest in such program?
    - (2) Do attorneys participate in or review training?
    - (3) When an attorney is designated as an instructor at a TRADOC post, are there adequate hours provided for LOW training and current POI's prepared?
    - (4) What form has law of war training taken (Classroom, field exercises, CPX, etc.)?
    - (5) Are unit personnel trained to the DOD/Army standard, i.e., commensurate with their duties and responsibilities?
    - (6) Is there a viable, aggressive law of war training/preventive law program?
  - \* (7) Do judge advocates participate in field training? In what capacity?
  - \* (8) Is there a judge advocate on the "Battle Staff"?
  - \* (9) Is there a billet for the judge advocate in the Tactical Operations Center (TOC)?
22. OVERSEAS SJA OFFICES.
  - a. Is there an attorney within the office designated to handle SOFA matters?

- b. Are the SJA and designated specialist familiar with the SOFA supplementary agreement and the provisions of AR 27-50?
- c. Is there a certified trial observer in the office?
- d. Are trial observer reports adequate and are there any problems in regard to rights guaranteed to US soldiers, dependents and civilians?
- e. Are there good working relations with the local national prosecutors and policy officials?
- f. Is the legal assistance officer familiar with special problems facing the soldier overseas? Is there a local national attorney on the staff or available for consultations?
- g. Is the claims officer familiar with handling foreign claims?

**23. ETHICS.**

- a. Has an active training/review program been established to sensitize judge advocates, civilian counsel and support personnel to their ethical responsibilities?
- b. What major issues/problems in the ethical conduct of SJA personnel have arisen in the past year? How were they resolved? Have the lessons learned been communicated to TJAGSA personnel responsible for instruction in this area?
- \*c. Does every attorney have a personal copy of the current ABA Model Code of Professional Responsibility and Judicial Conduct; and a copy of the new Army Rules of Professional Conduct?

**24. FELONY PROSECUTION PROGRAM.**

- a. Is the SJA aware of the program, and what are his/her plans to participate in the program?
- b. If the program has been implemented, how is it progressing, and what tangible results have been achieved? What problems have been encountered; how have they been resolved; and have those problems, solutions, and results been communicated to DAJA-LTG, the OTJAG staff activity responsible for oversight of the program?

**25. REGULATORY LAW.**

Are procedures in effect for learning of and reporting to JALS-RL of utility rate increases and other proposals affecting local Army activities?

**\*26. INTELLECTUAL PROPERTY**

- a. Are the SJA, DSJA, and Chief, Ad Law, aware that Intellectual Property Law (IPL) assistance is available telephonically or in writing from the Intellectual Property Counsel of the Army?
- b. Are any attorneys assigned to the office patent attorneys and/or interested in specializing in IPL; and, if so, are interested attorneys aware of the IPL LL.M. Program?
- c. Has Federal trademark protection been obtained or requested for eligible post/command newspapers?
- d. Are acquisition attorneys aware of the "Final Rule" on DFARS; Patents, Data, and Copyrights, published in the Fed. Reg. for 16 Apr 87 at 12390 et. seq.?
- e. Does the post have an IPL related mission (e.g., AMC subcommands), and, if so:
  - (1) Are military attorneys assigned to the IPL Division?
  - (2) What training, if any, is provided to a military attorney prior to working in the IPL (particularly patents) field?

**27. TRANSITION TO WAR.**

- a. Do contingency plans exist in the SJA office for a partial or complete (Division) (Corps) move out?
- b. Do SJA personnel have assigned roles for partial or complete move-outs?
- c. Do SJA personnel know what items of personal equipment they must have available for contingency plan execution?
- d. Are contingency plans flexible?
- e. Are SJA contingency plans coordinated with the Headquarters and the HHC?
- \*f. Do contingency plans provide for the need to prepare large numbers of personnel for overseas movement? Does the office have the ability to prepare large numbers of wills and powers of attorney on short notice? Do the contingency plans provide for bolstering the size of the legal assistance office?

**\*28. PROCUREMENT FRAUD.**

- a. Has a Procurement Fraud Advisor (PFA) been appointed?
- b. Does the PFA have an established Standard Operating Procedure (SOP) IAW Appendix F, AR 27-40.
- c. Has the PFA established a working relationship with local investigative agencies to assure the prompt notification and coordination of all procurement fraud cases?
- d. Has the PFA established a local training program, to keep commanders and investigators current on indicia of contract fraud?
- e. Have there been or is there an ongoing case of contract fraud? If so:
  - (1) Was a "Procurement Flash Report" transmitted by DATAFAX IAW paragraph 8-5, AR 27-40?
  - (2) Was a comprehensive remedies plan developed and forwarded with the DFARS 9.472 Report IAW Appendix H, AR 27-40?
  - (3) Has the PFA continued to monitor all civil fraud recovery efforts, and provided continued technical assistance when required?

## Goals and Objectives for 1987-1988

*The Judge Advocate General has identified the following goals and objectives for the Corps for 1987-1988.\**

### I. ENCOURAGE INNOVATION

1. Promote Judge Advocate initiatives, e.g., DOD Interface Program, Binding Arbitration Test Program, one-stop claims operations (transportation and claims combined). (All)
2. Conceptualize the JAG Office of the Future. (TJAGSA)
3. Implement Honduran Cooperative Legal Projects. (OTJAG)
4. Integrate Army patents activities. (OTJAG)
5. Improve legal organization for prevention of fraud, waste, and abuse. (OTJAG)
6. Improve statutory and regulatory bid protest system. (OTJAG)
7. Study structural organization of defense and judicial services under a TOE Legal Services Command, to meet Army of Excellence concepts. (TJAGSA)

### II. ENHANCE GOOD SOLDIER AND FAMILY SERVICES

1. Expand ability to deliver legal assistance to soldiers and their families. (All)
2. Enhance the Army Tax Assistance Program. (All)
3. Enhance delivery of claims services. (All)
4. Support Army Family Action Plan initiatives. (All)
5. Improve the Army Preventive Law Program. (All)
6. Eliminates policies that distract soldiers from training activities. (All)

### III. DEVELOP FUTURE LEADERSHIP

1. Emphasize importance of field recruiters. (OTJAG)
2. Expand efforts to attract minority applicants. (OTJAG)
3. Maximize opportunity for staff judge advocate assignments. (All)
4. Continue to refine the force management plan and seek every opportunity to improve promotion opportunity consistent with long range goals of DOPMA and JAGC. (OTJAG)
5. Study civilian attorney management practices. (OTJAG)
6. Institutionalize the Acquisition Law Specialty Program. (OTJAG)
- \*7. Develop an International and Operational Law Career Management Strategy. (OTJAG)

8. Emphasize delegation and decentralization. (All)
9. Develop and expand soldier common task skill training. (All)
10. Emphasize early involvement in decision-making processes. (All)
11. Promote Army values: loyalty, integrity, selfless service, and personal responsibility. (All)
- \*12. Develop and encourage a claims career progression and specialty program. (OTJAG)

### IV. DEVELOP QUALITY PROGRAMS

1. Study JAGSO improvements. (TJAGSA)
2. Encourage judge advocates and legal MOS enlisted soldiers, on release from active duty, to participate in the Reserve Components. (All)
3. Continue the broad review of TJAGSA curriculum and policies. (TJAGSA)
4. Develop a Model Enlisted Training Program for on-sites. (TJAGSA)
- \*5. Keep the Legal Specialist Handbook updated. (OTJAG)
6. Coordinate worldwide CLE programs. (TJAGSA)
7. Support professional associations. (All)
- \*8. Develop a first class para-legal program. (TJAGSA)
- \*9. Study 71D Training. (OTJAG)

### V. INTEGRATE TECHNOLOGY

- \*1. Proceed to install and operate office automation networks using standard LAWS hardware and software products. (All)
2. Develop model software. (OTJAG)
- \*3. Provide training and guidance in areas of automation. (All)

### VI. IMPROVE COMMUNICATION SYSTEMS

1. Continue policy letters designed to assist recipients in monitoring important areas of legal interest. (OTJAG)
2. Coordinate Article 6 inspections, general officer functional area visits, on-site visits, and professional association meetings as much as possible. (OTJAG)
3. Continue emphasis on technical channel of communication. (OTJAG)

### VII. EXERCISE BUREAUCRATIC LEADERSHIP

1. Emphasize cooperation in OTJAG-OGC relations. (OTJAG)
2. Continue proactive role in JAG support of the AR-STAF. (OTJAG)
3. Promote regulatory simplification. (All)

\*Indicates material that has been modified or added.

## VIII. COMPLETED ACTIONS

1. Implement annual "TJAG Award for Excellence in Legal Assistance" program. (All) (1987)
2. Compile a Legal Specialist Handbook. (OTJAG) (1987)
3. Compile an Enlisted Career Development Pamphlet for MOS 71D/E. (OTJAG) (1987)

4. Proceed with care in acquiring technology, with emphasis on systems for the Office of the Judge Advocate General and its field operating activities. (1986-87)

5. Institutionalize the Information Management Office as a clearinghouse for information management initiatives. (OTJAG) (1987)

## Revised Concept Statement for Judge Advocate General's Corps' Offices of the Future

*Lieutenant Colonel Stephen J. Harper*

*Director, Developments, Doctrine and Literature Department, TJAGSA*

Major General Overholt tasked The Judge Advocate General's School (TJAGSA) to prepare a concept statement addressing how the Corps will practice law in the future. The School was to analyze the JAG Corps' mission in the 1990s and beyond, considering personnel requirements, functional areas, office structure, and information management needs. The study culminated with a briefing to the Corps' general officers. The text of the briefing is reprinted below.

In order to improve and refine our ideas, we invite your comments concerning the concept statement and its analysis of the future direction of the JAG Corps. Send your written comments to: The Judge Advocate General's School, ATTN: JAGS-DD (LTC Harper), Charlottesville, Virginia 22903-1781. Comments should be received by 1 March 1988.

### Introduction

This will be an information briefing on TJAGSA's revised concept statement addressing Judge Advocate General's Corps' offices of the future. The briefing is divided into four basic parts: purpose; methodology of preparation; analysis of functional areas, office structure, and information management architecture; and conclusion.

### Purpose

The revised concept statement addresses the functional and personnel requirements of Judge Advocate General's Corps' offices of the future and creates a working document to which the leadership of the Corps can refer as necessary. TJAGSA was tasked to prepare the concept statement in March 1986. The methodology used in its development relied heavily on input from subject matter experts (SME). The Developments, Doctrine and Literature Department briefed the task to the Academic Divisions to facilitate SME input. Additionally, we communicated with staff judge advocate offices in the field and invited comments from their perspective.

The initial concept statement was submitted to the Office of The Judge Advocate General (OTJAG) in July 1986. It was circulated for comments to the OTJAG Divisions, the

United States Army Legal Services Agency (USALSA), and the United States Army Claims Service during July and August 1986. Input resulting from this circulation formed the basis for the revised concept statement, which was submitted in November 1986. In February 1987, the School was tasked to brief the revised concept statement. This briefing is the result.

### Methodology of Preparation

We made several key assumptions during the course of preparing the revised concept statement. In general, the coordinating agencies seem to agree with these assumptions. First, the JAG Corps will face a broader, more complex legal mission in the future. Second, there will be increased attorney specialization in certain functional areas, which may result in more junior JA's giving personal advice to senior commanders and staff officers on a more frequent basis. Third, a satisfactory mix of civilian and military Table of Distribution and Allowances, (TDA) legal assets will be required, and in order to ensure the accession of the highest quality civilian attorneys (on a professional par with majors) we must strive to upgrade attorney positions to the GS-13 level at least. Fourth, we must have "state of the art" information management and communications systems. Finally, there must be a clarification of the "linkage" responsibilities between Table of Organization and Equipment (TOE) and TDA assets.

### Analysis

#### Functional Areas

Doctrinally, as reflected in Training and Doctrine Command Pamphlet 525-52,<sup>1</sup> the Army's legal service support is divided into five functional areas: criminal law, legal assistance, international/operational law, claims, and administrative/contract law. The analysis of these functional areas has become the core of the concept statement. I will now highlight the results of this analysis.

**Criminal Law.** In the area of criminal law, within the combat or TOE force structure, more general court-martial

<sup>1</sup> U.S. Army, Training and Doctrine Command, Pam. No. 525-52, Military Operations—U.S. Army Operational Concept for Providing Legal Services in Theaters of Operation, para. 4 (21 Mar. 1986).

convening authorities will be required in our special operations forces. Because of the emphasis on joint operations, there is a need in conflicts of long duration for single service processing to completion of actions involving sister service members. In the TDA or sustaining base, there will be an increased use of federal magistrates, which may require additional appointments. Also, judge advocates can anticipate greater participation in U.S. district court trials of civilians who commit felonies on the enclave.

**Legal Assistance.** The second functional area is legal assistance. We determined that legal assistance officers must place an increased emphasis on preparation for overseas movement and emergency readiness deployment exercises in order to prepare our soldiers for mobilization. In addition, we anticipate the delivery of expanded legal assistance on the battlefield through the use of the individually carried record, a microchip worn like dog tags. This record may include such personal documents as a will and powers of attorney. To facilitate use on the battlefield of the individually carried record, it will be necessary to create software that allows interface with the Tactical Army Combat Service Support Computer System or Unit Level Computer used by the legal specialists at battalion and brigade, and legal service support providers at the staff judge advocate office.

Soldiers' legal assistance needs will become increasingly sophisticated. This will require development and continued expansion of the Legal Automation Army-Wide System legal assistance software package on the sustaining base side of the house. This software, in compatible format, must be shared with TOE legal offices.

In the alternative disputes resolution area, there will be an expansion of arbitration and mediation. It is probable that there will be a continued emphasis on the in-court representation program, with the possibility of a change in statutory law to allow for an increase in the scope of representation by removing the indigency requirement across the board. We must work for legislation creating a federal statutory will, a fill-in-the-blank document for use during mobilization, which will be recognized as valid in all fifty states and the territories. Also, the Army has to arrive at a consensus and prepare a standard Army power of attorney to be recognized by all Army agencies, instrumentalities, private organizations, and businesses operating on our enclaves.

**International/Operational Law.** The functional area of international/operational law (I/OL) has experienced an explosion in the volume of judge advocate activity. In fact, the combat force judge advocate's primary role in low intensity conflict probably will be in the area of international/operational law. He or she will be required to develop expert knowledge in this area, while maintaining basic skill levels in the other functional areas, so as to be able to deliver immediate legal assistance, claims, and contract law advice on the battlefield. The judge advocate in the combat force can expect a great increase of involvement in tactical I/OL matters. This will be especially true at the division and corps levels, where the plans and operations officer will assume greater importance.

The sustaining base force will require experts in this area as well, who may be consolidated above installation level. These TDA experts will, no doubt, experience an increase in involvement in strategic areas of international/operational law such as foreign military sales, status of forces agreements, and intelligence oversight.

**Claims.** In the claims area, the combat force judge advocate must be able to perform basic tasks on an as-needed basis in peacetime and, perhaps more importantly, in a deployed environment. The TDA force, however, will accomplish the majority of claims tasks in peacetime. The high degree of sophistication of claims-related legal issues will require increased specialization by judge advocates and, possibly, the use of more Department of the Army civilian attorneys, especially in such areas as the Federal Tort Claims Act, e.g., medical malpractice, and claims under status of forces agreements. To help handle this explosion, the U.S. Army Claims Service plans for the central processing of paperwork associated with the claims functional area and is developing programs that will use advanced information management technology in order to facilitate this endeavor. As an aside, this increased reliance on information management systems may make up in part for manpower constraints.

**Administrative and Contract Law.** The fifth functional area can be divided into two distinct parts: administrative law and contract law. The combat force judge advocate will be required to perform basic administrative law tasks in peace and in combat, especially in such areas as officer and enlisted personnel actions, letters of reprimand, conflicts of interest, and Article 138<sup>2</sup> complaints. The TDA judge advocate will perform administrative law tasks associated with installation activities such as nonappropriated fund instrumentalities, legal basis of command, private organizations, and organizations and functions of the Army.

The contract law area, like the international/operational law area, is experiencing an explosion in activities. Most work in this area will be done by the sustaining base force. The Department of Defense Reorganization Act will require significant changes in the way we do business. These changes will include arriving at an appropriate mix of civilian and military attorneys throughout the Army who can provide adequate legal support to the acquisition process. The Acquisition Law Speciality Program must be expanded and strengthened. The Judge Advocate General's Corps should provide an adequate training base for new military attorneys interested in this area by assigning them to acquisition work at Continental United States (CONUS) installations. Judge advocates should be offered more demanding contracting assignments after attending the graduate course, for example, with the Army Material Command and its commodity commands. The TDA mission will broaden in such areas as foreign military sales, commercial activities, Corps of Engineer projects, major weapons systems acquisition, and host-nation support agreements.

The recently-created Procurement Fraud Division must continue to receive emphasis in order to ensure aggressive monitoring of all contracts and assertion of all potential

<sup>2</sup> Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1982).

civil and criminal remedies. The Acquisition Law Assistance Program (ALAP) seems sure to be the type of operation that will be able to provide assistance to attorneys in the field. Major Army Commands (MACOMs) will expand their activities in this area and the acquisition law specialists at CONUS installations will become more proactive in the entire acquisition process to include the performance stage.

On the combat force side of the house, acquisition attorneys must be able to perform basic functions in this area, especially in a deployed environment where host-nation support and off-shore contracting will predominate.

**Civil Law.** The revised concept statement proposes a sixth functional area: civil law. Approval of this proposal is in line with the organization of OTJAG. It would include such subjects as civilian personnel law, labor law, commercial activities, Freedom of Information and Privacy Acts, litigation, regulatory law, and, of course, an area that looms big on the horizon—environmental law. TDA judge advocates working in this area will need special training. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 and the Superfund Reauthorization Act of 1986 are causing a dramatic increase of work in the environmental law area. The Judge Advocate General's Corps must review training, organization, staffing, and chain of technical supervision in order to provide adequate legal advice and support in the environmental law area—from general counsel/TJAG level down to the installations.

#### *Office Structure*

Staff judge advocate offices will continue to be located down to the separate brigade level within the combat force and down to the installation level within the sustaining base. We must emphasize the linkage between the TOE and TDA legal offices and between the TOE and TDA portions of an integrated legal office. This will facilitate transition to war by precluding the situation where a TOE judge advocate, who is involved with sustaining base work, creates a void by his or her deployment.

Because of the increased specialization in claims, international/operational law, contract law, and civil law by TDA attorneys, regional law centers, or a similar organization, may be a better way to deliver the most technical legal service support. The decentralization of OTJAG operational assets may be a precursor of the decision to create regional law centers. For example, the reassignment of the Litigation Division to USALSA and its pending move out of the Pentagon, and the creation of the Procurement Fraud Division and the soon to be created Acquisition Law Assistance Program, both within USALSA, may be the first step towards the ultimate decentralization of specialists with "operational responsibilities" to organizations like regional law centers. This may be beneficial even though a recent acquisition law study advised against such decentralization.

MACOM legal offices may function in dual roles as MACOMs and as part of the regional law center structure. Certainly, their role vis-a-vis specialization will be enhanced. There must be a satisfactory mix of military and

civilian attorneys within the TDA legal force structure to ensure adequate specialization, stability, and flexibility.

#### *Information Management Architecture*

The Army of the future will be a constrained force. These constraints have applied and will continue to apply to the Judge Advocate General's Corps. To make up for them, we must make the most effective use of information management architecture by creating a JAG-wide acquisition strategy that, in spite of the overall Army problems, will ensure compatibility. Our goal should include the development of a system that will allow immediate transmission of reports and documents from field legal offices to OTJAG and the field operating agencies. To keep current on the law as it develops, we should strive for on-line access at every level to opinions such as the U.S. Supreme Court, the military appellate courts, OTJAG, the General Services Administration, the Comptroller General, the Merit Systems Protection Board, and the Armed Services Board of Contract Appeals.

Laser printing is an important tool that will enhance the capabilities of field operating agencies and MACOM legal offices. State of the art information management technology, such as the increased use of optical character readers and speech recognition systems, will allow for immediate creation of finished products. This will be especially helpful in the preparation of records of trial; publication of the Corps' pamphlets, regulations, and legal periodicals; and the volumes of documents required in the claims and litigation areas.

We must create a focal point within the Corps to receive and review innovations from any level. If approved, we need to have the capability to share ideas with the field electronically.

The JAG Corps must keep pace in the interactive video disc area. We should look towards developing internal capabilities to prepare scripts, write programs, and produce our own laser discs for use on the electronic information delivery system, which should be available to every legal office.

#### **Conclusion**

JAGC offices of the future will be more tailored to the missions of the commands that they support. There will be a clearer distinction between the work required to be performed by TDA and TOE legal offices. The highly technical aspects of acquisition law, international/operational law, claims, litigation, and civil law bespeak the need for specialization and possible consolidation above installation level of TDA military and civilian legal service support providers. This consolidation may be facilitated by the expansion of MACOM legal offices, the creation of regional law centers, or both. Advanced communication and information management systems are essential to the JAGC in order to continue providing quality legal advice on a timely basis to the Total Army of the 1990s and beyond.

# An Analysis of the Military Construction Codification Act

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## Introduction

Our federal government operates within the constraints of laws and regulations that strictly limit the obligation and expenditure of public funds by the executive branch.<sup>1</sup> These limitations exist because through history Congress determined it necessary to legislate not only how much but also how and when public funds may be obligated or expended.

Federal government personnel involved in obligating or expending public funds, be they commanders, comptrollers, or contracting officers, are admonished to ensure their actions do not violate these proscriptions. Significantly, officers or employees of the United States government who exceed or otherwise fail to comply with fund limitations established by Congress are subject to serious adverse personnel actions<sup>2</sup> or even criminal penalties,<sup>3</sup> depending upon the facts and circumstances of the case. Attorneys should therefore ensure that their advice to these persons fully considers these requirements.

An important limitation on the obligation and expenditure of public funds is the Military Construction Codification Act,<sup>4</sup> which went into effect on October 1, 1982.<sup>5</sup> To provide a better understanding of the Military Construction Codification Act and its limitations, this article will examine the history and purpose of the law, and analyze key provisions.

Key to this understanding is the recognition that this law does not stand alone, and must be read in conjunction with pertinent provisions of annual Department of Defense (DOD) authorization and appropriations acts. Accordingly, this article will also analyze past and present congressional oversight of military construction.

## The Congressional Oversight Function

Our founding fathers determined that Congress should have the power to control the expenditure of all public

funds by the federal government.<sup>6</sup> Article I, section 9, clause 7 of the Constitution provides in part: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by law."<sup>7</sup> Simply stated, this means the executive branch may not contract for goods and services, or otherwise obligate the federal government to pay any debt, except as provided for by the Congress in an appropriations act.

This constitutional provision, appropriately known as the "power of the purse,"<sup>8</sup> permits Congress to have the final word on the procurement of new heating plants for defense facilities in Europe,<sup>9</sup> or the contracting out of commercial activities at a defense installation in Pennsylvania.<sup>10</sup> This "power of the purse" has been described as "the most important single curb in the Constitution on Presidential power."<sup>11</sup>

Through the federal budget process, Congress determines whether to provide funds for a particular program or activity so that the program or activity may be legally procured.<sup>12</sup> That is, utilizing its constitutional powers, Congress oversees executive branch programs and activities, including the military construction program. But exactly how is this done, and which committees of Congress authorize and appropriate funds for military construction?

The federal budget process is initiated by executive branch agencies, such as the Department of Defense, who prepare estimates of funds needed to carry out their programs. These estimates are submitted to the Office of Management and Budget, which reviews them based on presidential policies and projected federal revenues. After coordination and approval, the President submits the budget to Congress in January of each year.<sup>13</sup>

Congress acts upon the Presidential budget in a two-step procedure basic to the organization of the congressional

\*This article was originally prepared in satisfaction of the Advanced Acquisitions elective of the 35th Graduate Course.

<sup>1</sup> Fenster & Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155 (1979).

<sup>2</sup> 31 U.S.C. § 1349(a) (1982).

<sup>3</sup> 31 U.S.C. § 1350 (1982).

<sup>4</sup> 10 U.S.C. §§ 2801-2861 (1982).

<sup>5</sup> 10 U.S.C. § 2801 (1982) (effective date note).

<sup>6</sup> See E. Corwin, *The Constitution & What It Means Today*, 43, 133 (14th ed. 1978).

<sup>7</sup> See J. Cibinic & R. Nash, *Formation of Government Contracts*, 31-32 (2d ed. 1986).

<sup>8</sup> Office of General Counsel, United States General Accounting Office, *Principles of Federal Appropriations Law 2-9* (1st ed. 1982) [hereinafter *Principles of Federal Appropriations Law*].

<sup>9</sup> Continuing Appropriations, Fiscal Year 1987, Pub. L. No. 99-591, § 9038, 100 Stat. 3341, 3341-108 [hereinafter Pub. L. No. 99-591].

<sup>10</sup> *Id.* at § 9068.

<sup>11</sup> E. Corwin, *supra* note 6, at 134.

<sup>12</sup> Fenster & Volz, *supra* note 1, at 158.

<sup>13</sup> Williams, *Annual Authorization of Appropriations: The Historical Development of 10 U.S.C. § 138*, 21 A.F.L. Rev. 481-82 (1979).



budget system.<sup>14</sup> Congress authorizes the appropriation and expenditure of public funds in an authorization act, and then, in a separate statute, appropriates the funds.<sup>15</sup> Before an appropriations act is passed, there must generally be a separate statute authorizing the federal agency program or activity that is the subject of the appropriation.<sup>16</sup> Accordingly, the authority to spend public funds is provided by the enactment of an authorization law and thereafter an appropriation law.<sup>17</sup>

The Department of Defense budget, including military construction, is primarily considered by the Armed Services Committees of the House of Representatives and the Senate, which authorize appropriations, and by the Defense Subcommittees of the Appropriations Committees of both Houses, responsible for appropriations laws. These four committees hold separate hearings, at different times, where Department of Defense representatives, or witnesses, appear to explain and justify the programs and activities finally included in the President's budget.<sup>18</sup>

After full consideration of the budget by Congress, annual Department of Defense authorization acts authorize funds to be appropriated for those categories listed in 10 U.S.C. § 138. Working from the guidance and amounts authorized by the authorization acts, the Appropriations Committees of both Houses eventually agree on appropriations for the Department of Defense, and Congress enacts the annual Department of Defense appropriations act,<sup>19</sup> presumably by 1 October each year. Thus, the two-step budget procedure gives the Armed Services Committees and the Appropriation Committees joint oversight of Department of Defense programs and activities.

The two-step budget process described above, that is, authorization prior to appropriation, is a long-standing requirement.<sup>20</sup> Since 1837, the rules of the House of Representatives have forbidden appropriation for any expenditure not previously authorized by law.<sup>21</sup> Nevertheless, Congress for many years passed generalized authorization acts on a continuing basis for major procurement by the Department of Defense.<sup>22</sup> As a result of this practice, the Armed Services Committees of both Houses did not actually exercise oversight of the Department of Defense, and the oversight of the Department of Defense rested solely in the hands of the Appropriation Committees.<sup>23</sup>

The Armed Services Committees made a significant change in this relationship, and took a more positive role in the oversight of the Department of Defense, in the 1950s.<sup>24</sup> They did this initially by requiring annual authorization of principal weapons programs:

Section 412. (a) The Secretary of Defense shall, on or before January 31, 1960, submit to the President of the Senate and the Speaker of the House of Representatives complete and detailed information with respect to the various types and kinds of aircraft, missiles, and naval vessels being procured.

(b) No funds may be appropriated after December 31, 1960, to or for the use of any armed force of the United States for the procurement of aircraft, missiles, or naval vessels unless the appropriation of such funds has been authorized by legislation enacted after such date.<sup>25</sup>

This requirement for annual authorization quickly spread to most Department of Defense programs and activities, and by the 1970s it was clear the requirement for annual authorization of defense programs prior to appropriations was here to stay.<sup>26</sup>

Statutory requirements for authorizations to precede appropriations now also exist for military construction:

§ 138. Annual authorization of appropriations and personnel strengths for the armed forces; annual manpower requirements and operations and maintenance reports.

(a) No funds may be appropriated for any fiscal year to or for the use of any armed force or obligated or expended for—

(6) military construction (as defined in subsection (f));

unless funds therefor have been specifically authorized by law.

<sup>14</sup> J. Lehman, *The Executive, Congress, and Foreign Policy: Studies of the Nixon Administration* 173 (1976), construed in Williams, *supra* note 13, at 482. This simplified explanation of the congressional budget system omits an analysis of the roles of the Congressional Budget Office and the budget committees. The Reagan Administration has transformed the congressional budget system to a three-step procedure. See H. Shuman, *Politics and the Budget: The Struggle Between the President and the Congress* (1984).

<sup>15</sup> Fenster & Volz, *supra* note 1, at 158.

<sup>16</sup> J. Cibinic & R. Nash, *supra* note 7, at 31-32.

<sup>17</sup> Williams, *supra* note 13, at 482.

<sup>18</sup> Office of Counsel to the Comptroller of the Navy, *Fiscal Law Deskbook* 5 (1981) [hereinafter *Navy Fiscal*].

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> Williams, *supra* note 13, at 482.

<sup>21</sup> J. Lehman, *supra* note 14, at 173, construed in Williams, *supra* note 13, at 482; see Rule XXI(2), Rules of the House of Representatives; see also Rule XVI, Standing Rules of the Senate.

<sup>22</sup> See Dawson, *Congressional Innovation & Intervention in Defense Policy: Legislative Authorization of Weapons Systems*, 56 Am. Pol. Sci. Rev. 42-43 (1962).

<sup>23</sup> *Id.* at 42; see Williams, *supra* note 13, at 483-85.

<sup>24</sup> Williams, *supra* note 13, at 482-83.

<sup>25</sup> Military Installations & Facilities Act, Pub. L. No. 86-149, 1959 U.S. 73 Stat. 302 (1959) [hereinafter Pub. L. No. 86-149].

<sup>26</sup> Williams, *supra* note 13, at 529.



(f)(1) In subsection (a)(6), the term "military construction" includes any construction, development, conversion, or extension of any kind which is carried out with respect to any military facility or installation (including any Government-owned or Government-leased industrial facility used for the production of defense articles and any facility to which section 2353 of this title applies), any activity to which section 2807 of this title applies, any activity to which chapter 133 of this title applies, and advances to the Secretary of Transportation for the construction of defense access roads under section 210 of title 23. Such term does not include any activity to which section 2821 or 2854 of this title applies.<sup>27</sup>

Funds for military construction are now annually authorized and appropriated under acts separate from the Department of Defense authorization and appropriation acts.<sup>28</sup> Those acts provide annual approval and funding for the Department of Defense military construction program. Moreover, in the process of considering and approving the military construction program, Congress also exercises oversight of that program by placing limits and controls on the program in the annual Department of Defense authorization and appropriation acts. As an example, annual congressional oversight of military construction was demonstrated in substantial amendments to the Military Construction Codification Act as stated in the National Defense Authorization Act for Fiscal Year 1987.<sup>29</sup> The Armed Services Committees, in the authorization process, have extended their oversight to all military construction.<sup>30</sup> This has arguably diminished the power of the Appropriations Committees by giving the Armed Services Committees oversight control over the start of new construction programs and projects, and has most definitely increased the amount and degree of congressional analysis of Department of Defense programs.<sup>31</sup>

This brief review of the federal budget process is in no way intended to comprehensively analyze the complex area of congressional oversight of the Department of Defense. It is intended to alert the reader to the fact that Congress annually scrutinizes Department of Defense programs, including military construction. While the Military Construction Codification Act is the primary statement of Congress on the military construction program, Congress uses the budget process to maintain supervision of the military construction program and ensure that the Department of Defense is acting in compliance with congressional mandates. Department of Defense personnel faced with issues of

interpretation of the Military Construction Codification Act must therefore also examine the annual authorization and appropriation acts to ensure compliance with congressional limitations and controls over military construction.

Now that the broad scope of congressional control over the military construction program has been examined, it is time to analyze the single most important legislation in this area, the Military Construction Codification Act.

### Purpose of the Act

Development of the Military Construction Codification Act began in the fall of 1978 after completion of the Military Construction Authorization Act for fiscal year 1979. Initially, certain key subcommittee members of the Armed Services Committees of both Houses recognized that, over the years, language pertaining to military construction had been developed for inclusion in the annual bill and was repeated without change from year to year. Subcommittee staffs thereafter concluded that much of this language should be enacted into permanent law and could be restated in a more understandable and usable form.<sup>32</sup> A draft of this proposed legislation was initially sent to the Department of Defense for coordination in March of 1979.<sup>33</sup>

After extensive coordination between pertinent committees of both Houses and the Department of Defense, the Military Construction Codification Act went into effect on 1 October 1982.<sup>34</sup> The purpose of the act was to revise and codify in a new chapter (chapter 169) of title 10, United States Code, recurring and permanent provisions of law relating to military construction and military family housing.<sup>35</sup> The act also transferred related military construction provisions of title 10 to the new chapter.<sup>36</sup>

### Major Provisions of the Act

For the most part, military construction and family housing construction authorization limits and procedures are simply incorporated in a new format. Certain streamlining changes in policy and procedures are adopted in the Act, however, to improve the military construction program.<sup>37</sup>

### Decentralization of Administration

The Department of Defense, as part of the fiscal year 1983 military construction program, proposed a number of management improvements for the administration of defense facilities and construction projects.<sup>38</sup> DOD expected a reduction in costly administrative processing delays and

<sup>27</sup> 10 U.S.C. § 138 (1982); see Principles of Federal Appropriations Law, *supra* note 8, at 2-11; see also Ms. Comp. Gen. B-111810 (8 Mar. 1974).

<sup>28</sup> Navy Fiscal, *supra* note 18, at 112; see Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106, § 801, 89 Stat. 531, 537 (1975).

<sup>29</sup> National Defense Authorization Act For Fiscal Year 1987, H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 233 (1986) [hereinafter Conf. Rep. 99-1001].

<sup>30</sup> See Williams, *supra* note 13, at 533, 536.

<sup>31</sup> *Id.* at 545-48.

<sup>32</sup> House Armed Services Comm., Military Construction Codification Act, H.R. Rep. No. 97-612, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 441, 442 [hereinafter Leg. Hist. Military Construction Codification Act].

<sup>33</sup> *Id.*

<sup>34</sup> 10 U.S.C. § 2801 (1982) (effective date note).

<sup>35</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 441.

<sup>36</sup> *Id.*

<sup>37</sup> See Military Construction Codification Act: Hearings on S. 990 Before the Senate Armed Svcs. Comm., 97th Cong., 2d Sess. 128 (1982) [hereinafter Senate Hearings].

<sup>38</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 443.

the encouragement of responsible management at the lowest possible echelon.<sup>39</sup> Congress generally concurred with the decentralization philosophy, and reflected this in provisions of the Act as follows:

#### DECENTRALIZATION OF ADMINISTRATION OF MILITARY CONSTRUCTION AND MILITARY FAMILY HOUSING

Subchapter/ section	Item	Activities Decentralized
I-2803	Emergency construction.	Determination that deferral of project would be inconsistent with national security.
I-2805	Unspecified minor construction.	Approval of unspecified minor construction project. Cost variation reporting for unspecified minor construction projects. Congressional notification whenever minor construction project cost would exceed fifty percent of ceiling amount.
I-2807	Architectural and engineering services and construction design.	Congressional notification whenever design fee would exceed \$300,000.
II	Military family housing.	All approvals and congressional notifications except for designation of special command positions.
III-2853	Authorized cost variations.	Congressional notification whenever cost variation exceeds a threshold.
III-2854	Restoration or replacement of facilities damaged or destroyed.	Approval and congressional notification. <sup>40</sup>

As an example, under the provisions of the Act, the ceiling on an unspecified minor construction project is now \$1 million, and prior approval is not required if the project is less than \$500,000.<sup>41</sup> This decentralization philosophy pervades the Act, and the broad language of the act makes it clear that the authority granted to a "Secretary" includes the Secretary of Defense and the Secretaries of the military departments, so that a separate delegation of authority is no longer necessary.<sup>42</sup> The belief is that lower approval levels and decentralization will allow the military services greater flexibility, eliminate many unnecessary reports, and generally place responsibility with the administrator most directly involved in the construction program.<sup>43</sup>

#### Defining Construction

A significant change in the Act is in the critical area of definition of terms. The legislative history of the Act suggests that Congress was primarily concerned with drafting definitions that would eliminate or at least downplay military construction budgeting or execution problems.<sup>44</sup> Of secondary concern was that some restrictive language was necessary to prevent abuses of the authority granted, especially in minor construction.<sup>45</sup> Accordingly, the final versions of the act from both Houses proposed to use the same definition for both a military construction project and a minor construction project: "[A] single undertaking at a military installation that includes all construction work, and acquisition, and installation of equipment necessary to accomplish a specific purpose, and to produce a complete and usable facility or a complete and usable improvement to an existing facility."<sup>46</sup>

This proposed definition may appear familiar: it was taken almost verbatim from the definition of a minor construction project in 10 U.S.C. § 2674 (1982).<sup>47</sup>

The Department of Defense provided extensive input to Congress on descriptive terms in this definition that DOD considered unnecessarily narrow and restrictive so as to complicate military construction budgeting.<sup>48</sup> The most troubling and restrictive terms identified were "single undertaking," "installation of equipment," "to accomplish a specific purpose," and "a complete and usable facility."<sup>49</sup>

Congress finally determined that different definitions for military construction projects and minor construction projects were necessary. The definitions of these two terms, however, were substantively revised in the Act so as to completely omit the restrictive terms "installation of equipment" and "to accomplish a specific purpose." Military construction is now defined as follows:

(a) The term "military construction" as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation.

(b) A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law).<sup>50</sup>

<sup>39</sup> See *Senate Hearings*, *supra* note 37, at 128-29.

<sup>40</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 444.

<sup>41</sup> 10 U.S.C. § 2805 (1982).

<sup>42</sup> See *Senate Hearings*, *supra* note 37, at 162.

<sup>43</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 444.

<sup>44</sup> See *Military Construction Codification Act: Hearings on H.R. 5241 Before the House Armed Svcs. Comm.*, 97th Cong., 2d. Sess. (1982) [hereinafter *House Hearings*].

<sup>45</sup> *Id.* at 63; see *Senate Hearings*, *supra* note 37, at 143.

<sup>46</sup> *Senate Hearings*, *supra* note 37, at 66; see *House Hearings*, *supra* note 44, at 13.

<sup>47</sup> Murrell, *Major Changes in Minor Construction*, *The Army Lawyer*, Mar. 1983, at 26.

<sup>48</sup> See *Senate Hearings*, *supra* note 37, at 142-43.

<sup>49</sup> *House Hearings*, *supra* note 44, at 63.

<sup>50</sup> 10 U.S.C. § 2801 (1982).

The omission of the term "installation of equipment" in defining both military construction and minor construction suggests that Congress agreed with the Department of Defense that installation of equipment is not necessarily included in a construction project, nor is it necessarily procured with military construction appropriations. Thus it would be proper to procure and install specialized or complex equipment in a separate contract, using an appropriation such as the operation and maintenance account. Computer equipment is an example where this would be permitted.<sup>51</sup> Similarly, the fact that Congress no longer uses the term "to accomplish a specific purpose" in defining both types of construction indicates agreement with DOD that rapidly expanding military technology has served to create weapons systems and facility needs that often require construction of a family of structures that may have completely different functional uses separately, but which are all necessary to the successful functioning of the system as a whole.<sup>52</sup> An example is the creation of an Army installation where an extensive number of separate structures with separate functional purposes are necessary to accomplish the end objective of an operating Army installation.

Section 2802 of title 10 now states the authority for military construction projects. Subsection (a) is new language that restates the requirement of section 138 that authority of law is needed to carry out military construction projects. The source of the provisions of subsection (b) are sections 101 and 701 (second sentence) of the Fiscal Year 1982 Military Construction Authorization Act, Public Law 97-99.<sup>53</sup> It specifies what construction is included in a military construction project. In the section, the term "incident to the project" means those items that are normally built into a building, structure, or facility. An example that clarifies the intent of the phrase "supporting facilities incident to the project," follows.

The lowest life-cycle cost alternatives for a barracks project is the renovation of permanent barracks buildings to new construction habitability standards, rather than constructing new barracks. The renovation will remove billeting spaces during the period of construction, however. A temporary building is needed during the renovation period to house the personnel. This building would be appropriately classified as a supporting facility incident to the construction and such building could be either leased or constructed. The cost of the temporary facility should therefore be included on the project justification document and in the life cycle cost analysis.<sup>54</sup>

The authority for a military construction project requires that the project provide a complete and usable facility, or a complete and usable improvement to a facility, except where construction of only a portion of a complete and usable facility is specifically authorized by law. That is, the

construction project that is the subject of line item authorization and appropriation within the military construction program must be complete and usable for its functional purpose upon completion. A reading of the legislative history does suggest, however, that Congress contemplates the need to install, connect, and test technical or mechanical equipment using, in many instances, a separate contract and funding. Logically, therefore, the construction project meets the "complete and usable facility" criteria even though the equipment procurement is a not-yet completed separate procurement.<sup>55</sup> In general, an exception to the complete and usable criteria exists only for contracts in excess of \$50 million, where cost effective contracting would permit obligations in successive fiscal years.<sup>56</sup>

A minor construction project is defined by extending the definition of a military construction project:

#### 2805. Unspecified minor construction

(a) Within an amount equal to 125 percent of the amount authorized by law for such purpose, the Secretary concerned may carry out minor military construction projects not otherwise authorized by law. A minor military construction project is a military construction project (1) that is for a single undertaking at a military installation, and (2) that has an approved cost equal to or less than the amount specified by law as the maximum amount for a minor construction project.<sup>57</sup>

A minor military construction project may either precede a military construction project for a new mission requirement when such minor construction would provide a complete and usable facility to meet a specific need during a specific timeframe, or follow a military construction project when new mission requirements develop after the military construction project has been completed. For both cases, the appropriate committees of Congress should be notified of such undertakings for any minor military construction project that exceeds twenty percent of the maximum amount for a minor military construction project. The following construction activities should not be accomplished as a minor military construction project: splitting a project into increments solely to reduce the cost below an approval threshold or the minor construction ceiling amount; undertaking incrementation that results in a higher cost of construction because of a sacrifice of economy of scale; or concurrent work on an active military construction project to reduce the cost of the military construction project below cost variation notification levels.<sup>58</sup>

Congress spent considerable effort drafting definitions that the Department of Defense generally agreed with, and that eliminated or reduced military construction budgeting and execution problems. Certain troubling and restrictive terms were eliminated and other difficult terms, although

<sup>51</sup> House Hearings, *supra* note 44, at 63.

<sup>52</sup> *Id.*

<sup>53</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 455.

<sup>54</sup> *Id.*

<sup>55</sup> House Hearings, *supra* note 44, at 63-64.

<sup>56</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 454.

<sup>57</sup> 10 U.S.C. § 2805 (1982).

<sup>58</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 455.

retained, were explained in the legislative history. Importantly, the restrictive language still in the act is there to prevent abuses of authority, such as the language that forbids incremental construction so as to avoid approval thresholds and fund ceilings. Other key provisions of the Military Construction Codification Act were also modified.

#### *Unspecified Minor Construction*

A significant change in policy and procedure in the Military Construction Codification Act is in the area of minor military construction. The source of the unspecified minor construction<sup>59</sup> section in the new chapter to title 10 is former section 2674 of title 10. In this new provision, Congress not only redefined a minor military construction project, but also dealt with the issue of placing a specific dollar ceiling on minor construction projects, and the wisdom of distinguishing between specified and unspecified minor construction projects in authorization and appropriation acts.

When section 2674 of title 10 was enacted in 1958, minor construction was for the accomplishment of urgent requirements that had not been included as a specified project in an annual authorization act. These projects became known as unspecified minor construction projects.

In the 1978 Military Construction Authorization Act, the minor construction authority was modified. It was expanded to all small projects (now those under \$1 million) that did not warrant line item treatment. The objectives set forth at that time were to provide DOD and the military departments with increased flexibility, and to reduce by approximately one-half the number of projects that the appropriate committees of Congress had to examine in detail each year.

The first objective concerned the unspecified (out-of-budget cycle) requirements that may be budgeted for only in a lump sum. The second objective concerned "specified locations minor construction" that are known and programmable requirements below the minor construction project ceiling amount of \$1 million. Since the 1978 amendments, the amount authorized for minor construction each year has been a single amount which includes an amount for known projects at specified locations and an amount for the unspecified requirements. An advantage of the change made in fiscal year 1978 was that the single amount authorized provided flexibility to the military departments. It permitted them to shift savings, subject to applicable intra-appropriations transfer procedures, should unspecified requirements fail to develop to the degree forecast or bid costs of unspecified location projects exceed the program estimates.

Since the 1978 changes were made, some drawbacks to the changes have surfaced. One drawback was that authorizing appropriations for specified location minor construction projects separately from the total amount for an installation obscured the total authority being provided for an installation. It was determined advantageous to include the known minor construction, the specified location projects, under the amount for an installation. Accordingly, a single amount was authorized to be appropriated for unspecified minor construction projects and authority for specified location minor construction projects was included within the dollar amount total of the installation.<sup>60</sup> So, which of these 1978 changes were included in the Military Construction Codification Act?

As mentioned earlier, Congress dealt with the issue of establishing a specific dollar ceiling on minor construction projects in the Military Construction Codification Act. In determining not to do this, Congress determined that a specific dollar ceiling for minor construction projects would be soon obsolete, and therefore require periodic statutory change. This would have been inconsistent with the purpose of codifying recurring provisions of law.<sup>61</sup> Congress accordingly set forth a procedure to minimize changes in the Military Construction Codification Act by establishing that the dollar ceiling for minor construction projects would be set forth each year in the annual military construction authorization act.<sup>62</sup> Since fiscal year 1983, that amount has been established as \$1 million.<sup>63</sup> The Secretarial approval amount and congressional notification amount was set at fifty percent of the maximum amount for a minor construction project.<sup>64</sup> Also, the use of annual operation and maintenance (O&M) funds for a minor construction project was authorized in an amount not to exceed twenty percent of the maximum amount for a minor construction project.<sup>65</sup> Now, the use of O&M funds is limited to "unspecified military construction projects costing not more than \$200,000."<sup>66</sup> The Military Construction Codification Act also excluded the use of minor military construction authority for the construction of new family housing units.<sup>67</sup>

Interestingly, the legislative history suggests that Congress also considered the feasibility of funding all minor construction with only military construction appropriation funds. Although O&M appropriation funds expire annually, DOD convinced Congress that the use of operation and maintenance funds for construction at the installation level provides necessary flexibility in managing minor construction.<sup>68</sup> There is no indication in recent legislation that suggests Congress will limit or abrogate the authority to use O&M funds for minor construction projects. It seems logical, however, that Congress will rethink this issue when

<sup>59</sup> 10 U.S.C. § 2805 (1982).

<sup>60</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 448-49.

<sup>61</sup> *Id.* at 444-45.

<sup>62</sup> *Id.*

<sup>63</sup> See Murrell, *supra* note 47, at 25-26.

<sup>64</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 457.

<sup>65</sup> *Id.* at 457-58.

<sup>66</sup> 10 U.S.C. § 2805, as amended by Pub. L. No. 99-661, § 2702(a), Nov. 14, 1986, 100 Stat. 4040; see 1986 U.S. Code Cong. & Admin. News at 6413.

<sup>67</sup> 10 U.S.C. § 2805(d) (1982).

<sup>68</sup> See Senate Hearings, *supra* note 37, at 132; Leg. Hist. Military Construction Codification Act, *supra* note 32, at 457-58.

they consider authorizing and approving a two-year Defense budget starting in fiscal year 1988. As a result of this accommodation to the Department of Defense's wish to retain authority to use O&M funds, Congress indicated that better reporting procedures on the use of O&M funds must be implemented.<sup>69</sup>

The \$1 million minor construction authority threshold has been set in accordance with the method prescribed by the Military Construction Codification Act. Recently, Congress demonstrated that it is no longer satisfied with the method used to establish the minor construction authority threshold. Both Houses recommended substantial revisions to the authority in formulating the fiscal year 1987 Department of Defense authorization act.<sup>70</sup>

The Senate bill contained a provision (section 2162) that increased the minor construction threshold to \$2 million from \$1 million. A further provision (section 2171) provided for a lump sum authorization for appropriation for projects costing less than \$2 million and authority to reprogram minor military construction projects not otherwise authorized.

The House amendment contained a provision (section 2711) that codified the threshold for minor construction at \$1 million, the threshold for unspecified minor construction requiring congressional notification at \$500,000, and the threshold for unspecified construction out of the operations and maintenance accounts at \$200,000.

The Senate agreed for fiscal year 1987 to the House amendment. Both Houses agreed, however, that the Senate approach should be explored because it could increase the military department's flexibility to meet unforeseen construction requirements. Because this represents a potential major change to current law, Congress deferred action until the concept could be studied further and a consensus reached with appropriate committees of Congress with jurisdiction over this matter.<sup>71</sup>

The end result of these approaches, as discussed above, was that section 2805 of title 10 was amended in fiscal year 1987, as follows:

**Sec. 2702. CODIFICATION OF CERTAIN AMOUNTS REQUIRED TO BE SPECIFIED BY LAW**

**(a) MAXIMUM AMOUNT FOR UNSPECIFIED MINOR MILITARY CONSTRUCTION PROJECTS.**—Section 2805 of title 10, United States Code, is amended—

(1) in subsection (a), by striking out "the amount specified by law as the maximum amount for a minor military construction project" in clause (2) and inserting in lieu thereof "\$1,000,000";

(2) in subsection (b)(1), by striking out "50 percent" and all that follows through "project" and inserting in lieu thereof "\$500,000"; and

(3) in subsection (c), by striking out "20 percent" and all that follows through "project" and inserting in lieu thereof "\$200,000."<sup>72</sup>

Thus, for the first time since the Military Construction Codification Act became effective, Congress established a dollar threshold on the minor military construction authority. This suggests that Congress believes that annual authorization of the minor construction authority threshold adversely affects minor military construction budgeting or construction execution, and that reauthorization each year is an unnecessary administrative burden. The proposed Senate approach, if adopted in fiscal year 1988, would greatly expand the minor construction threshold and answer DOD's requests for increased decentralization of approval authority, greater flexibility for field managers, and lessened reporting requirements. As an example, operation and maintenance monies could be used up to a \$400,000 ceiling, enabling installation commanders to accomplish minor construction to satisfy changing mission requirements immediately, and be more responsive to unforeseen Defense priorities and security deficiencies.

***Advance Planning, Construction Design, and Architectural Engineering Services***

Before the Military Construction Codification Act was enacted, a permanent statute provided authority for advance planning.<sup>73</sup> The purpose of this statute (10 U.S.C. § 2661a) was to enable the military to prepare plans and specifications for construction projects to be proposed to Congress. The plans and specifications needed to be in enough detail so that Congress could ascertain the scope of the project and make accurate cost estimates to support authorization and appropriation acts.<sup>74</sup>

Pursuant to this advance planning authority, military departments established milestones every fiscal year for the completion of plans and specifications. These milestones were tied to congressional hearings on the authorization and appropriation acts for the construction projects. The purpose of the milestones was to shorten the time between the funding of a construction project by Congress and the advertising and award of a contract. This schedule for planning and execution was necessary to avoid the lapse of authorizations.<sup>75</sup>

The use of advance planning remains a vital part of the military construction program. The procedures were changed by the Military Construction Codification Act, however, which at section 2807 authorizes the Secretary concerned, within the amounts appropriated, to carry out architectural and engineering services and construction design for any military construction project or land

<sup>69</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 458.

<sup>70</sup> See, e.g., S. 2638, 99th Cong., 2d Sess. § 2162 (1986); see also Conf. Rep. 99-1001, *supra* note 31, at 557.

<sup>71</sup> Conf. Rep. 99-1001, *supra* note 31, at 233 and 557.

<sup>72</sup> 10 U.S.C. § 2805, as amended by Pub. L. No. 99-661, § 2702(a), Nov. 14, 1986, 100 Stat. 4040; see 1986 U.S. Code Cong. & Admin. News at 6413.

<sup>73</sup> 10 U.S.C. § 2661a(a)(1) (1982), repealed by act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(31)(B), 96 Stat. 1287, 1296 (1982).

<sup>74</sup> Navy Fiscal, *supra* note 18, at 122.

<sup>75</sup> *Id.* at 123.

acquisition project.<sup>76</sup> The objectives of this new section are to permit development of preliminary estimates of project cost based on preliminary design, and to achieve execution of the military construction program early in the fiscal year.<sup>77</sup> It also permits the use of such appropriations<sup>78</sup> for construction management of projects that are funded by foreign governments for which funds would not be available for the normal United States oversight functions of design, review, and supervision of construction, including associated overhead costs. Advance planning is now funded solely from the operations and maintenance account.<sup>79</sup>

Prior to the enactment of this section, the continuing authority of the predecessor advance planning statute was used for appropriating funds annually for planning and design. The section now requires annual authorization of planning and design appropriations, increasing congressional oversight of this military activity. The section also provides that Congress will set the dollar threshold for use of this authority each year.<sup>80</sup> Since fiscal year 1983, the threshold has been \$300,000 as set forth in the annual authorization acts.<sup>81</sup> Rather than continuing to set the dollar threshold every year, Congress amended the Act in fiscal year 1987 and codified the maximum amount for architectural and engineering services as follows: "Section 2807(b) of such title is amended by striking out 'the maximum amount specified by law for the purposes of this section' and inserting in lieu thereof '\$300,000.'"<sup>82</sup>

#### *Authorized Cost Variations*

Perhaps the area of most significant change is the key provisions relating to authorized cost increases for military construction projects, and the notice requirements when this authority is used.

A reading of the legislative history indicates that Congress recognized that the complexities of the construction

marketplace make it impossible for the military departments to estimate precisely what a construction project is going to cost.<sup>83</sup> Consequently, the military departments have always had the legal flexibility to allow some variation in cost from the estimates presented to Congress in executing their construction program.<sup>84</sup>

All military construction projects, from minor construction projects to major construction projects, military family housing projects, and land acquisition projects, may be subject to cost variation. The Military Construction Codification Act establishes thresholds for use of this authority to approve cost variations on all types of military construction projects.<sup>85</sup>

For cost variations on minor construction, the Act established an absolute ceiling of \$1,250,000.<sup>86</sup> The approved amount of a minor construction project may be increased prior to award up to the ceiling if the Secretary concerned determines that the increase is necessary to meet an unusual variation in cost that could not reasonably have been anticipated at the time the project was originally approved.<sup>87</sup> If the new estimated cost of the project exceeds \$1 million and is more than twenty-five percent of the original approved amount for the project,<sup>88</sup> no contract may be awarded until:

- (1) the reduction in scope of work or the increase in cost, as the case may be, is approved by the Secretary concerned;
- (2) a written notification of the facts relating to the . . . increased cost (including a statement of the reasons therefor) is submitted by the Secretary concerned to the appropriate committees of Congress; and
- (3) either 21 days have elapsed from the date of the submission of the notification under clause (2) or each of the appropriate committees of Congress has indicated approval of the proposed . . . increased cost.<sup>89</sup>

<sup>76</sup> 10 U.S.C. § 2807 (1982).

<sup>77</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 459. The term "advance planning" was eliminated because Congress did not want those functions related to the planning process performed under authority of this section. Instead, advance planning functions are accomplished at the O&M account approval level, providing flexibility and eliminating administrative burdens. Advance planning functions include developing the requirement for a military construction project, developing a master plan for an installation, preparing alternative site studies, developing and validating military construction project design, preparing engineering analyses and studies to develop technical design parameters, and preparing environmental impact assessments and statements. Architectural and engineering services and construction design include all engineering services and design required for proposed military construction projects, site investigations, surveys and mapping, sketches, preparation of cost estimates for construction and land acquisition projects, plans, specifications, and construction contract documents.

<sup>78</sup> See Leg. Hist. Military Construction Codification Act, *supra* note 32, at 459. Other functions that may be performed under the authority of this section are: developing and updating design criteria and manuals; preparing standard designs and definitive drawings used on military construction projects; managing military construction program design and contract administrative services for design; preparing project cost certifications; administering architectural and engineering services contracts for the design of military construction and land acquisition projects; and pre-construction contract award activities including printing and reproducing bid documents, preparing pre-bid government estimates, and liaison with prospective bidder and construction personnel. Overhead costs for the above functions, such as travel, supplies, material, and equipment, should be charged to the appropriations authorized under the authority of this section.

<sup>79</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 459.

<sup>80</sup> 10 U.S.C. § 2807 (1982 & Supp. III 1985); see House Hearings, *supra* note 44, at 62.

<sup>81</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 445. For the legislative history and purpose of Pub. L. No. 99-661, see 1986 U.S. Code Cong. & Admin. News at 6413.

<sup>82</sup> 10 U.S.C. § 2807 (1982), as amended by Pub. L. No. 99-661, §§ 2702(b), 2712(a), 100 Stat. 3816, 4040-41 (1986).

<sup>83</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 449-50.

<sup>84</sup> *Id.*

<sup>85</sup> 10 U.S.C. § 2853 (1982).

<sup>86</sup> *Id.*; see Senate Hearings, *supra* note 37, at 130.

<sup>87</sup> See Murrell, *supra* note 47, at 26.

<sup>88</sup> *Id.*

<sup>89</sup> 10 U.S.C. § 2853(b) and (d) (1982).



When a minor military construction project has a claim or combination of claims, or there are unusual variations in cost causing the contract to exceed the ceiling, the Secretary concerned is authorized to carry out the project in an amount above the amount appropriated for the project by Congress in order to meet the costs of change orders or contractor claims.<sup>90</sup> In this case, the Secretary is required to promptly notify the appropriate committees of Congress of the revised cost of the project and the reasons for the revision.<sup>91</sup>

For cost variations on military construction projects, when the appropriated amount for a project must be increased by more than twenty-five percent, or by more than 200 percent of the minor construction project ceiling (\$1 million), whichever is less, the appropriate committees of Congress must be notified.<sup>92</sup> Two other conditions must also be met: the increase must be for an unusual variation in cost; and such increase could not reasonably have been anticipated at the time Congress approved the project.<sup>93</sup>

#### *Emergency and Contingency Construction*

Recurring provisions in annual military construction authorization acts provided authority for emergency and contingency construction.<sup>94</sup> Sections of the Military Construction Codification Act restate those provisions without significant policy changes, but with some procedural revisions.<sup>95</sup>

The difference between contingency and emergency authorization involves three major areas. First is the level of approval authority. Emergency authority is intended to meet an unforeseen facility need of a military department and can be approved by the Secretary concerned. Conversely, contingency authority is intended to provide unanticipated facility needs that relate to the missions and function of more than one military service, and require the approval of the Secretary of Defense. Second, emergency authority is unfunded and must be financed through reprogramming approval sought by the military department concerned, while contingency authority is financed annually in appropriation requests matching the authorization. Finally, the level of urgency of need differs in that emergency construction requires a determination that deferral of the project would be inconsistent with the interests of national security, while a contingency project must be determined by the Secretary of Defense to be vital to the security of the United States.<sup>96</sup>

**Emergency Construction.** Section 2803 of title 10 provides authority for emergency construction. A review of

this authority indicates significant recent changes from past procedures. Subsection (a) sets forth the criteria for the use of the authority of this section. The cumbersome five criteria previously used for qualifying a project for the use of emergency construction authority were replaced by a determination by the Secretary of the military department concerned that the project is vital to the national security and the requirement for the project is so urgent that deferring authorization for its construction to the next military construction authorization act would be inconsistent with national security. This authority should not be used for projects denied authorization in a prior military construction authorization act. No authorization of appropriations are provided in annual military construction authorization acts for the use of the authority of this section. Therefore, the use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or cancelling other military construction projects.<sup>97</sup>

Subsection (b) of the emergency construction section sets forth the reporting requirements for the use of the authority. Justifying the use of this authority and identifying the source of funds for an emergency construction project are new reporting requirements.<sup>98</sup>

Subsection (c)(1) limits the use of this authority by the Secretary of a military department to the obligation of \$30 million in any fiscal year. Accounting procedures should be established to account for secondary contract awards on projects for which the primary contract was awarded in a prior fiscal year.<sup>99</sup>

Finally, subsection (c)(2) limits the use of this authority to the total amount of funds appropriated for military construction that have not been obligated.<sup>100</sup>

**Contingency Construction.** Section 2804 of title 10 provides authority for contingency construction. Subsection (a) sets forth the criteria for the use of the authority of this section. It requires a determination by the Secretary of Defense that deferral of the project until the next military construction authorization act would be inconsistent with national security or the national interest. As with emergency construction, this authority should not be used for projects denied authorization or appropriations in prior military construction Acts. It is intended to be used for extraordinary projects that develop unexpectedly and for which the national interest or security could be jeopardized by a failure to start construction of the project at an early date. Authorization of appropriations should be provided

<sup>90</sup> 10 U.S.C. § 2853(e) (1982).

<sup>91</sup> *Id.*

<sup>92</sup> Leg. Hist. Military Construction Codification Act, *supra* note 32, at 450. This establishes, under the \$1 million ceiling for minor construction, a \$3 million project as the upper limit for the 25 percent to be operative. Above this amount, the 200 percent (\$2 million) limitation would control.

<sup>93</sup> *Id.* at 455.

<sup>94</sup> *Id.* at 455-56.

<sup>95</sup> *Id.*

<sup>96</sup> See *Senate Hearings*, *supra* note 37, at 129.

<sup>97</sup> Leg. Hist. Military Construction Act, *supra* note 32, at 456.

<sup>98</sup> *Id.* at 456-57.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

annually or as needed for the use of the authority of this section.<sup>101</sup>

Subsection (b) of the new contingency construction section sets forth the reporting requirements for the use of the authority. Justifying the use of this authority for the project in question is a new reporting requirement. Each notification of the intended use of the authority must include a report on the remaining authorizations and appropriations available for contingency construction.<sup>102</sup>

**Summary.** The most substantive change in these two new sections is restructuring for greater definition and clarity the emergency authorizations that previously had been repeated annually in each military department's title of the military construction authorization acts. The cumbersome five criteria that previously governed use of the emergency authority were deleted and replaced by a single determination of the Secretary of Defense that deferral of the construction is inconsistent with the interests of national security. Similarly, the dollar limitation on the use of the emergency authority was set at \$30 million in any fiscal year per military department. Such a limit prevented use of the authority for truly critical and unforeseen needs of any real magnitude.<sup>103</sup>

The new language is similar to the authority provided for emergency restoration of facilities damaged or destroyed, in that its use is limited in essence by the amounts that might be available by reprogramming, once a valid and urgent requirement has been certified. Execution of the authority is

limited by the necessity to notify the appropriate Committees of Congress and await either their individual approvals or the expiration or a waiting period.<sup>104</sup>

### Conclusion

The Military Construction Codification Act restates in a single piece of permanent legislation all policy and procedures pertaining to the military construction program. Previously, that guidance was in various permanent laws and in numerous military construction authorizations acts, complicating military construction budgeting and execution.

Congress intended to simplify the budgeting and execution of military construction projects while maintaining congressional supervision of those projects. To accomplish that goal, Congress not only restated previous guidance, but also revised and made changes in policy and procedures.

Department of Defense personnel responsible for the military construction mission must ensure that they have an understanding of the Military Construction Codification Act. Importantly, this law does not stand alone and must be read every year in conjunction with the annual DOD authorization and appropriation acts.

Violations of the statutory approval thresholds and fund ceilings established by the Act and coordinate provisions of the annual authorization and appropriation acts require reports to Congress. Additionally, violations may subject the offender to serious adverse personnel actions or even criminal penalties.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *House Hearings*, *supra* note 44, at 57.

<sup>104</sup> *Id.* at 57-58.

## USALSA Report

*United States Army Legal Services Agency*

### *The Advocate for Military Defense Counsel*

#### **The Constitution and the Criminally Accused Soldier: Is the Door Opening or Closing?**

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In light of the bicentennial of the United States Constitution, it is appropriate to consider the relationship of that most fundamental document to the soldier accused of a crime. This analysis is also particularly relevant in light of the recent Supreme Court decision in *Solorio v. United*

*States*,<sup>1</sup> which overruled the Court's decision in *O'Callahan v. Parker*,<sup>2</sup> and made court-martial jurisdiction contingent solely on the accused's status as a soldier rather than the "service-connection" of the charged offense. The Court's decision in *Solorio* raises the issue of how many of

<sup>1</sup> 107 S. Ct. 2924 (1987).

<sup>2</sup> 395 U.S. 258 (1969).



the protections afforded a civilian by the Constitution extend to the military and who may decide which constitutional protections apply to the accused soldier.<sup>3</sup> This article will discuss this issue, summarize how the Constitution has been applied to soldiers prior to *Solorio*, and present proposals to aid defense counsel in litigating constitutional issues on behalf of their clients.

### The Implications of *Solorio*

Chief Justice Rehnquist's reasoning in *Solorio* was not prolix: article I, section 8, clause 14 of the Constitution<sup>4</sup> gives Congress the power to make rules for the government and regulation of the land and naval forces. Those rules made by Congress<sup>5</sup> placed no limitation on the military's authority to exercise court-martial jurisdiction except that of the status of the accused.<sup>6</sup> Contrast this reasoning in *Solorio* with that of Justice Douglas in *O'Callahan*. Justice Douglas recognized that Congress had the power to regulate the land and naval forces but found that because the rules developed by Congress did not afford a soldier the same constitutional protections afforded civilians, their application should be limited to prosecutions of offenses that were "service connected."<sup>7</sup> Justice Douglas thus treated the *O'Callahan* case as a due process issue and fashioned a jurisdictional remedy, while Chief Justice Rehnquist treated *Solorio* solely as a jurisdictional issue with a jurisdictional outcome.<sup>8</sup> This dichotomy of treatment of essentially the same issue raises questions that are crucial in determining the scope of criminally accused soldiers' constitutional rights. Did Chief Justice Rehnquist's opinion in *Solorio* imply that courts-martial currently provide (or must provide) soldiers the same constitutional protections as are provided to civilians and therefore the restrictions imposed by *O'Callahan* are no longer required? Or alternatively, does the opinion strictly hold that Congress alone has the sole prerogative to decide what constitutional rights, if any, will be accorded the accused soldier and how these rights will be applied? In supporting the first of these propositions, this article will discuss how the ambiguity created by *Solorio* can be used to support litigation involving constitutional protections for the accused soldier.

### Striking a Balance Between the Need for a Strong and Well Disciplined Fighting Force and the Rights of an Accused Soldier

The Constitution is a remarkable sovereign charter that limits governmental powers by creating certain individual rights deemed superior to and contradictory to governmental powers.<sup>9</sup> This intent was expressly delineated by the adoption of the Bill of Rights as the first ten amendments. Presumably acting in accordance with the new Constitution, Congress adopted the Articles of War<sup>10</sup> to assist in regulating its land and naval forces.<sup>11</sup> The Articles of War, however, did not explicitly embrace the precepts of the new Constitution and were instead essentially a modified version of the British Articles of War.<sup>12</sup> Our Articles gave the commander near plenary authority to dispense discipline as he felt necessary to accomplish his mission. It was not until after World War II that we finally moved away from the Articles of War and adopted the Uniform Code of Military Justice.<sup>13</sup> Although the UCMJ is much more complete and thorough than the Articles of War, it is still modeled after the Articles and is primarily a procedural guide codifying military tradition.<sup>14</sup> The modern UCMJ makes no mention of the soldier's relationship to the Constitution.

There is little, if any, evidence to suggest that Congress gave serious consideration to the relationship between the soldier and the Constitution when it adopted the Code. This is not to say that the members of Congress did not intend to provide fair military tribunals. To the contrary, after World War II, Congress recognized that a fair system of military justice was essential to an effective fighting force. Proponents of the UCMJ particularly sought to curtail illegal command influence while at the same time retaining numerous military traditions, especially the prerogatives of the commander. Above all, the lawmakers sought to avoid telling commanders how to conduct military operations. In the final analysis, however, Congress, intentionally or unintentionally, left unresolved the exact balance to be drawn between a commander's perceived need for swift discipline and a soldier's constitutional rights.<sup>15</sup>

As early as 1953, the Supreme Court stated that "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."<sup>16</sup> At the same time,

<sup>3</sup> For previous analysis regarding the application of the Constitution to the soldier, see Hirschorn, *The Separate Community: Military Uniqueness and Serviceman's Constitutional Rights*, 62 N.C.L. Rev. 177 (1984); Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

<sup>4</sup> U.S. Const. art. I, § 8, cl. 4.

<sup>5</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982 and Supp III 1985) [hereinafter UCMJ].

<sup>6</sup> *Solorio*, 107 S. Ct. at 2930.

<sup>7</sup> 395 U.S. at 274.

<sup>8</sup> It is interesting to note that the majority opinion in *Solorio* completely and presumably intentionally ignored the issue of the constitutional rights of militarily accused.

<sup>9</sup> See *The Ark of America*, Time, July 6, 1987, at 23.

<sup>10</sup> Articles of War, United States, 1 Stat. 95-96 (1789).

<sup>11</sup> W. Winthrop, *Military Law and Precedent* 46-60 (1896).

<sup>12</sup> *Id.*; see also *Parker v. Levy*, 417 U.S. 733, 745-46 (1974); W. Aycok & S. Wurfel, *Military Law Under the Uniform Code of Military Justice* 9 (1955) ("The substance of the original Articles of War has been traced to the Code of Gustavus Adolphus of 1621 and to the British Articles of 1774.")

<sup>13</sup> See generally *Hearings on H.R. 2498 before a Subcomm. of the Committee on Armed Services*, 81st Cong., 1st Sess. (1949) [hereinafter *Hearings on H.R. 2498*].

<sup>14</sup> *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

<sup>15</sup> See generally *Hearings on H.R. 2498*, *supra* note 12.

<sup>16</sup> *Burns v. Wilson*, 346 U.S. at 140 (Court begins discussion of Constitution and soldier by disclaiming any role in the development of military law).

the Supreme Court also recognized that it was the duty of Congress and the Executive Branch to strike the proper balance between the military mission and individual rights.<sup>17</sup> Later, in *Parker v. Levy*,<sup>18</sup> the Court again emphasized the difference between the military and civilian communities while upholding Congress' authority to determine that certain military necessities and traditions took precedence over a soldier's rights under the first amendment. Likewise, in *Middendorf v. Henry*,<sup>19</sup> the Court was presented with a question concerning a soldier's right to counsel at a summary court-martial. In resolving this question, the Court stated: "[W]e must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces . . . , that counsel should not be provided in summary courts-martial."<sup>20</sup> The Court concluded that the introduction of counsel would greatly complicate the proceeding beyond the intent of Congress, particularly in light of the one month maximum penalty involved.<sup>21</sup>

In *Rostker v. Goldberg*,<sup>22</sup> however, the Court recognized that due process sometimes limited Congress' authority in the area of military criminal law. While noting that the case arose "in the context of Congress' authority over national defense and military affairs and perhaps in no other area has the Court accorded Congress greater deference,"<sup>23</sup> the Court stated:

None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitation of the Due Process Clause, . . . but the tests and limitations to be applied may differ because of the military context.<sup>24</sup>

This approach continues to be applied by the current Court.<sup>25</sup>

In *O'Callahan*, Justice Douglas recognized the need to give great deference to the concerns of Congress and the Executive when adjudicating military matters.<sup>26</sup> In order to accommodate important military needs while at the same time providing as many constitutional safeguards as possible, Justice Douglas developed the "service connection test," which limited courts-martial jurisdiction to those

crimes that apparently had an impact on the military mission.<sup>27</sup> Now that Justice Douglas' test has been discarded, the issue is whether the Supreme Court will continue such a deferential approach to Congress and the President or will the Court expect the other branches of government to conform their regulation of the military to civilian constitutional standards. Although the answer to this question is unlikely to favor the military accused, there is some room for optimism.<sup>28</sup>

### Application of the Constitution by the Court of Military Appeals

In addition to recognizing Congress and the Executive as the proper authorities to regulate the armed forces, the Supreme Court has accorded great deference to the Court of Military Appeals as a judicial body with special knowledge and experience in adjudicating the rights of soldiers in relation to the military mission.<sup>29</sup> The Court of Military Appeals has held that the Bill of Rights and, in general, the Constitution apply to soldiers and that the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."<sup>30</sup>

The Court of Military Appeals, like the Supreme Court, has found it necessary to give deference to the peculiar needs of the military at the expense of the rights of the accused soldier. The Court has used its specialized knowledge to determine those instances in which a right accorded civilians must be modified to accommodate a particular military requirement. In *United States v. Priest*,<sup>31</sup> Judge Darden observed:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action, and is likely to produce such action. . . . In military life, however, other considerations must be weighed. The armed forces depend on a command structure that

<sup>17</sup> *Id.* In fact, in *Noyd v. Bond*, 395 U.S. 683 (1969), the Supreme Court recognized that Congress, at the time, had not given the Court appellate jurisdiction over the administration of military justice but instead had created the Court of Military Appeals—a court with specialized knowledge.

<sup>18</sup> *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), and *In re Grimley*, 137 U.S. 147, 153 (1890)).

<sup>19</sup> 425 U.S. 25 (1976).

<sup>20</sup> *Id.* at 43.

<sup>21</sup> *Id.* at 47, 48.

<sup>22</sup> 453 U.S. 57 (1981) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)); see also *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1952).

<sup>23</sup> 453 U.S. at 65.

<sup>24</sup> *Id.* at 68.

<sup>25</sup> See *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (when evaluating personal religious rights, courts must give great deference to professional judgment of military authorities); *Chappell v. Wallace*, 462 U.S. 296 (1983) (military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations).

<sup>26</sup> 395 U.S. at 261–62.

<sup>27</sup> *Id.* at 267, 273.

<sup>28</sup> When the Supreme Court has recognized a deviation from federal law by the military without proper justification, however, it has seen fit to interfere. See, e.g., *Goodson v. United States*, 471 U.S. 1063 (1984) (invocation of right to counsel prior to questioning).

<sup>29</sup> *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

<sup>30</sup> *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976); see also *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

<sup>31</sup> 21 C.M.A. 564, 45 C.M.R. 338 (1972).

at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.<sup>32</sup>

The Court of Military Appeals has not permitted modification or limitation of constitutional rights to accommodate the military in a liberal fashion, however. Indeed, in *United States v. Ezell*,<sup>33</sup> Judge Perry cited a long list of decisions according soldiers broad fourth amendment protections. In *United States v. Tempia*<sup>34</sup> the court recognized that decisions by the Supreme Court are generally binding on military courts unless there is an overwhelming need to the contrary.<sup>35</sup> The court then went on to adopt the fifth amendment protections delineated in *Miranda v. Arizona*.<sup>36</sup> The Court of Military Appeals was also willing to adopt the constitutional interpretations by the Supreme Court in *Edwards v. Arizona*<sup>37</sup> and *Smith v. Illinois*.<sup>38</sup>

The decision in *Solorio* will probably have little influence on the way the Court of Military Appeals views the relationship between the Constitution and the soldier. As demonstrated above, the court has applied the Constitution to the soldier except in those cases where it explicitly conflicts with the UCMJ. The court has hesitated to interfere with specific mandates of Congress expressed in the UCMJ, but instead has addressed the need for constitutional rights in areas Congress has left vacant. Thus, while it is unlikely that the court will find any major provisions of the UCMJ to be unconstitutional,<sup>39</sup> soldiers can expect to receive constitutional protections in areas where Congress has chosen not to speak.

#### At Which Doors Should Defense Counsel Knock?

Now that a framework has been established for understanding how the Supreme Court and the Court of Military Appeals apply the Constitution to the soldier, it is instructive to review the current status of the law, relative to the Constitution, in particular areas of concern to soldiers. In

1970, then Duke University Law Professor, Robinson O. Everett, wrote an article in which he compared the constitutional protections provided under the recently revised UCMJ to those protections required to be provided in state courts.<sup>40</sup> This article will employ Chief Judge Everett's article as a basis upon which to update the current status of a soldier's constitutional rights in relation to the laws established by Congress.

There are five areas of constitutional concern that involve major differences between civilian criminal law and the UCMJ. These are: the right to grand jury indictment,<sup>41</sup> the right to bail,<sup>42</sup> the right to a public trial,<sup>43</sup> the right to a unanimous verdict from an impartial jury selected from a cross-section of the community<sup>44</sup> and the right to an independent (Article III) judge.<sup>45</sup> This article will address each of these areas in terms of the latest Supreme Court standards and how the abbreviation or denial of these rights affects the military accused. It is hoped that this discussion will provide ideas to feed defense counsel's imagination in preparing for trial and also assist in building records sufficient to allow effective litigation of constitutional issues on appellate review. These categories are not necessarily exhaustive of the constitutional issues that may be raised; they are only meant to illuminate important areas of conflict between the Constitution and the UCMJ.

#### Grand Jury Indictment

Since Chief Judge Everett's article, the Supreme Court has not seen fit to overrule *Hurtado v. California*.<sup>46</sup> Thus, many states continue to exercise their option to prosecute by information rather than indictment.<sup>47</sup> Because of *Hurtado*, it seems unlikely that the Supreme Court or the Court of Military Appeals will give much consideration, if any, to a petition urging that the military may only prosecute by indictment. This is particularly true in light of the pre-referral procedures currently followed by the military, which include review of the charges by intermediate commanders,<sup>48</sup> a formal pretrial investigation conducted in the presence of the accused and counsel,<sup>49</sup> and a pretrial advice

<sup>32</sup> *Id.* at 570, 45 C.M.R. at 344 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) (citation omitted).

<sup>33</sup> 6 M.J. 307 (C.M.A. 1979).

<sup>34</sup> 16 at 635, C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>35</sup> *Id.* at 635, 37 C.M.R. at 255 (quoting *United States v. Armbruster*, 11 C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960)).

<sup>36</sup> 384 U.S. 436 (1966).

<sup>37</sup> 451 U.S. 477 (1981). The holding in *Edwards* was adopted by the Court of Military Appeals in *United States v. Reeves*, 20 M.J. 234 (C.M.A. 1985) and *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985).

<sup>38</sup> 469 U.S. 91 (1984). The holding in *Smith* was adopted by the Court of Military Appeals in *United States v. Goodson*, 22 M.J. 22 (C.M.A. 1986).

<sup>39</sup> *But see United States v. Cole*, 24 M.J. 18 (1987) (Everett, C.J. dissenting).

<sup>40</sup> Everett, *Military Justice Is To Justice As . . .*, 12 A.F. JAG L. Rev. 202-214 (1970).

<sup>41</sup> Compare U.S. Const. amend. V with UCMJ arts. 22-24.

<sup>42</sup> Compare U.S. Const. amend. VIII with UCMJ arts. 9, 10. *But see Salerno v. United States*, 107 S. Ct. 2095 (1987) (Chief Justice, in strong dicta, states that eighth amendment does not guarantee a right to bail).

<sup>43</sup> U.S. Const. amend. VI.

<sup>44</sup> Compare U.S. Const. amend. VI with UCMJ arts. 25, 52.

<sup>45</sup> Compare U.S. Const. art. III, § 1 with UCMJ arts. 26, 66.

<sup>46</sup> 110 U.S. 516 (1884) (states are not required to use grand jury for indictment purposes as long as they use an acceptable equivalent).

<sup>47</sup> For a list of those states that allow the government the option of prosecution by information, see W. LaFave & J. Israel, *Criminal Procedure* § 15.1(b) (1974).

<sup>48</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 401-404 [hereinafter R.C.M.].

<sup>49</sup> UCMJ art. 32; R.C.M. 405.

prepared for the convening authority by the staff judge advocate.<sup>50</sup> Consequently, defense counsel need not pursue this issue unless exceptional circumstances arise.

### *The Right to Bail*

Although the administration of military justice is oriented towards minimizing the use of pretrial confinement,<sup>51</sup> many soldiers are still subjected to such conditions. In *Salerno v. United States*,<sup>52</sup> the Supreme Court recently held that pretrial detention did not violate the fifth or eighth amendments. Specifically, the Court found that the challenged provision of the 1984 Bail Reform Act<sup>53</sup> was regulatory in nature and not punitive.<sup>54</sup> Article 13, UCMJ, explicitly states that military pretrial confinement may not be for purposes of punishment and by implication that such restraint is for regulatory purposes.<sup>55</sup> Consequently, in light of the Supreme Court's history of deference to military regulatory provisions, it seems very doubtful that the Court will tamper with Article 13. This is particularly true in light of the stringent procedures for review of pretrial confinement mandated by the Manual.<sup>56</sup>

It is also worth noting that at the time Chief Judge Everett wrote his article,<sup>57</sup> no provision existed for granting administrative credit for pretrial confinement against a soldier's sentence to confinement. Since the article, the Court of Military Appeals has held that a soldier's sentence must be credited with time spent in pretrial confinement (and in restraint tantamount to confinement) in order to conform with federal practice.<sup>58</sup>

### *Right to a Public Trial*

In *Waller v. Georgia*,<sup>59</sup> the Supreme Court held that although the right to a public trial is not absolute, the circumstances under which the public and press may be excluded are very limited. The Court went on to establish a three part test for excluding the public and press from a trial: the period of exclusion should be no broader than

necessary to protect the public interest; reasonable alternatives must be considered; and special findings should be made on the record.

The military rule of evidence concerning closed sessions of courts-martial is: "If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information."<sup>60</sup> This rule completely ignores the test established in *Waller*, and differs from the procedures established for the federal courts in the Classified Information Procedures Act (C.I.P.A.), which does not permit a closed session.<sup>61</sup> The military places the complete authority to close the court-martial from the public in the discretion of the military judge. The military should be put to the test to show why it requires a rule different than other governmental agencies when conducting a prosecution that deals with classified information. Deference should be given to the congressional mandate delineated in C.I.P.A. rather than a military rule of evidence.

### *Right to a Unanimous Verdict from an Impartial Jury Selected from a Cross-Section of the Community*

An area that may be ripe for Supreme Court review concerns the sixth amendment right to a unanimous jury verdict.<sup>62</sup> In *Ballew v. Georgia*<sup>63</sup> and *Burch v. Louisiana*,<sup>64</sup> the Supreme Court concluded that, at a minimum, the Constitution requires juries to be composed of no less than six members and if composed of six members, their decision must be unanimous. In *Ballew*, after considering volumes of data concerning the behavior of small groups, the Court concluded that at "some point, [the] decline in jury size leads to inaccurate fact-finding and the incorrect application of the common sense of the community to the facts."<sup>65</sup> The military should be required to demonstrate why a two-thirds verdict from a five and sometimes three member military fact-finding body<sup>66</sup> can be considered accurate, while a unanimous verdict from a five member civilian body is not considered accurate.<sup>67</sup>

<sup>50</sup> R.C.M. 406.

<sup>51</sup> UCMJ art. 10, 13.

<sup>52</sup> 107 S. Ct. 2095 (1987).

<sup>53</sup> 18 U.S.C. § 3142(e) (Supp. III 1985).

<sup>54</sup> 107 S. Ct. at 2101.

<sup>55</sup> UCMJ art. 13.

<sup>56</sup> R.C.M. 305(i).

<sup>57</sup> Everett, *supra* note 38.

<sup>58</sup> *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). See also *United States v. Gregory*, 23 M.J. 246 (C.M.A. 1986) (summary disposition) (appellant was entitled to additional administrative credit pursuant to R.C.M. 305(k) for pretrial restriction tantamount to confinement as a remedy for government's failure to follow procedural requirements for such constraint).

<sup>59</sup> 467 U.S. 39 (1984).

<sup>60</sup> Mil. R. Evid. 505(j); see Eisenburg, *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, *The Army Lawyer*, March 1981, at 9.

<sup>61</sup> 18 U.S.C. app. §§ 1-16 (1982).

<sup>62</sup> Anderson & Hunsucker, *Is the Military Nonunanimous Finding of Guilty Still an Issue?* *The Army Lawyer*, October 1986, at 57.

<sup>63</sup> 435 U.S. 223 (1978) (five member jury is unconstitutional per se).

<sup>64</sup> 441 U.S. 130 (1979) (a less than unanimous verdict from a six member jury was unfair and unconstitutional).

<sup>65</sup> *Ballew*, 435 U.S. at 232.

<sup>66</sup> See UCMJ arts. 16, 25, 51 and 52.

<sup>67</sup> *Ballew*, 435 U.S. 223; see also *Ake v. Oklahoma*, 470 U.S. 68 (1985) (the state, unlike a private litigant, has an interest in the fair and accurate adjudication of criminal cases); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (due process clause requires that tribunals foster accurate fact-finding).

Numerous military courts of review have rejected the proposition that unanimous verdicts are (or should be) required in the military.<sup>68</sup> The Army Court of Military Review has held that a two-thirds majority verdict from a five member military court is equal to, in terms of due process, a six member unanimous civilian verdict because military courts are "blue ribbon" fact-finders.<sup>69</sup> This logic is questionable at best. If military fact-finders possess greater fact-finding expertise than civilian jurors, then anything less than a unanimous verdict must be considered suspect. The opinion of one dissenting "blue ribbon" military fact-finder must be given more credence than the dissenting opinion of one civilian venireman chosen without reference to qualifying standards. Another, and possibly more compelling, reason justifying a nonunanimous military verdict is that such verdicts might require more deliberation time and result in "hung juries," thereby slowing the court-martial process. This argument was rejected, with regard to state courts, in *Burch*.<sup>70</sup> The above observations may provide some incentive for the Supreme Court to address a soldier's right to a unanimous six member verdict.<sup>71</sup>

Two other issues concerning the relationship between a court-martial and a civil jury trial are the processes of selecting and challenging members of the fact-finding panel. In *United States v. McClain*,<sup>72</sup> the Court of Military Appeals recognized that although the Constitution has been construed to call for juries representing a cross-section of the community, such a requirement has never been extended to the military.<sup>73</sup> The court went on to find that although a court-martial panel need not represent a cross-section of the community, it must not be chosen to obtain a panel less disposed to lenient sentences.<sup>74</sup> It seems unlikely that the Court of Military Appeals or the Supreme Court would be willing to extend the requirement for a representative cross-section to courts-martial. Unlike the state in *Duren v. Missouri*,<sup>75</sup> the military may very well have an overwhelming interest in the maintenance of superior-subordinate relationships and the efficient use of personnel. Thus panels composed of members senior to the accused and chosen by the commander are likely to be upheld.

An issue with more favorable potential for the soldier concerns the discriminatory use of the peremptory challenge. In *Batson v. Kentucky*,<sup>76</sup> the Supreme Court found

that a prosecutor's use of peremptory challenges against jurors of the same race as the defendant raised the issue of racial discrimination and required the judge, upon the request of defense counsel, to inquire of the prosecutor if he had a neutral explanation for the challenge. Because the military would be hard pressed to show any compelling interest justifying even the perception of racial discrimination, it is likely that the *Batson* inquiry will be required of military judges if properly raised.<sup>77</sup>

### Right to an Independent Judge

Article III of the Constitution provides federal judges with certain protections to assure their independence. Such protections are not required of the states and Article III status is not accorded military judges.<sup>78</sup> Military judges at general and special courts-martial and at the courts of military review are designated by The Judge Advocate General.<sup>79</sup> They are not assigned for specific terms, but normally serve in the position of judge for a standard tour of duty (three to four years). In *Northern Pipeline Co. v. Marathon Pipeline Co.*,<sup>80</sup> the Supreme Court recognized the need for Congress to establish and regulate certain specialized courts, to include courts-martial. Based on the Court's recognition that Congress has the power to establish and regulate specialized courts and the Court's tradition of deference to congressional and Executive control of the military, it seems unlikely that litigating an issue of the independence for military judges will be successful.<sup>81</sup>

### Conclusion

Although the chances for successful litigation in the above areas may seem rather bleak, defense counsel should not give up all hope of litigating constitutional issues. The above five areas deal with specific conflicts between civilian criminal constitutional law and the UCMJ, and courts will likely give deference to the mandate of Congress regardless of whether the deviation was intentional or merely a codification of military tradition. There is still the possibility that a fiercely litigated issue with a well-developed record will motivate an appellate court to issue an opinion providing more precise guidance on where the line falls between civilian law and military law.

<sup>68</sup> *United States v. Guilford*, 8 M.J. 242 (C.M.A. 1980); *United States v. Neely*, 21 M.J. 606 (A.F.C.M.R. 1985); *United States v. Seivers*, 9 M.J. 612 (A.C.M.R. 1980); *United States v. Corl*, 6 M.J. 914 (A.C.M.R.), *aff'd on other grounds*, 8 M.J. 47 (C.M.A. 1979).

<sup>69</sup> *Guilford*, 8 M.J. at 602; *Corl*, 6 M.J. at 915.

<sup>70</sup> 441 U.S. at 139.

<sup>71</sup> A petition for a writ of certiorari challenging the military's use of nonunanimous verdict was recently filed. *Mason v. United States*, 24 M.J. 127 (C.M.A.), *petition for cert. filed*, 55 U.S.L.W. 3838 (U.S. June 5, 1987) (No. 86-1935). Although the Solicitor General first waived response to the petition, on 23 July 1987 the Court requested that a response be filed.

<sup>72</sup> 22 M.J. 124 (C.M.A. 1986); *see also* *United States v. Greene*, 20 C.M.A. 232, 3 C.M.R. 72 (1970); *United States v. Crawford*, 15 C.M.A. 31, 35 C.M.R. 3 (1964).

<sup>73</sup> 22 M.J. at 128.

<sup>74</sup> *Id.* at 132; *see* Morgan, "Best Qualified" or Not? Challenging the Selection of Court-Martial Members, *The Army Lawyer*, May 1987, at 34.

<sup>75</sup> 439 U.S. 357 (1979) (Court found that State of Missouri's interest in ensuring that mothers were home to take care of children and household was not such a compelling interest to justify a limitation on the number of women in jury pool).

<sup>76</sup> 476 U.S. 79 (1986).

<sup>77</sup> The Court of Military Appeals has granted a petition for review on the applicability of the *Batson* inquiry to the military. *United States v. Santiago-Davila*, 24 M.J. 55 (C.M.A. 1987).

<sup>78</sup> *See* Fidell, *Judicial Tenure Under the Uniform Code of Military Justice System*, 30 N.Y.L. Sch. L. Rev. 757 (1985).

<sup>79</sup> UCMJ arts. 26(c), 66(a).

<sup>80</sup> 458 U.S. 50 (1982).

<sup>81</sup> *See* *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

The above discussion is limited to specific areas of conflict between civilian law and the UCMJ, and it was not intended to encompass a complete review of areas where constitutional litigation in courts-martial may be appropriate. The Court of Military Appeals has applied with vigor constitutional and Supreme Court precedent in areas not specifically addressed by Congress.<sup>82</sup> Defense counsel should be vigilant to place the burden on the government to show why a different standard should be applied at courts-martial rather than the one employed by federal courts in civilian criminal trials.

<sup>82</sup> See *supra* note 31-36 and accompanying text.

<sup>83</sup> "Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, and for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defense of the common wealth from foreign injury; and all this only for the public good." J. Locke, *An Essay Concerning the True Original, Extent And End of Civil Government*, in *Social Contract* 4 (R. Barker 1979).

<sup>84</sup> See Everett, *supra* note 38, at 214.

As soldiers, we give up many rights that as civilians we would take for granted. In most instances these rights are sacrificed for what may be the quintessential compelling state interest: national defense.<sup>83</sup> It is the defense counsel's role, however, as advocate of the rights of soldiers, to put the government to the test to prove the necessity of applying a different standard to soldiers than applied to civilians. As stated by Chief Judge Everett, "As in any other system, the fairness of military justice will depend on the caliber and integrity of the people who administer it."<sup>84</sup> As long as defense counsel keep pushing, the door will not close.

## DAD Notes

### Dealing With Client Perjury Under the Army Rules of Professional Conduct

The ethical conduct of lawyers practicing under the disciplinary jurisdiction of The Judge Advocate General is now governed by the Army Rules of Professional Conduct.<sup>1</sup> These new rules are based in large part on the 1983 American Bar Association Model Rules of Professional Conduct. Rule 3.3, under both the Army and Model Rules, deals with attorney candor toward tribunals.<sup>2</sup> This rule represents a significant departure from the past standards applied to lawyers when a client committed perjury in a criminal case.<sup>3</sup> Defense counsel must familiarize themselves with the changes and keep in mind conflicts that could arise when they are admitted to practice in jurisdictions that have not adopted Model Rule 3.3.<sup>4</sup>

Under the old Model Code of Professional Responsibility and both the Army and Model Rules, an attorney is expected to make every reasonable effort to dissuade a client from committing perjury and should seek to withdraw from representation if the client refuses to yield. Under the old standard, however, the attorney could nevertheless call the client who intended to commit perjury to the stand and let him or her testify in narrative form. The attorney could not argue or otherwise make use of any perjured statements.<sup>5</sup> The new Army Rules, by contrast, like the Model Rules, place an affirmative duty on the attorney to disclose the perjured statements. In trying to dissuade a client from committing perjury, the attorney should inform the client of this duty. When a client has committed perjury and the attorney becomes aware of that fact prior to the close of the proceedings, the attorney must encourage the client to make a disclosure to the tribunal, and, if the client refuses, the attorney must disclose if withdrawal from the case is

<sup>1</sup> Effective 1 October 1987. The rules are currently pending publication as a Department of the Army pamphlet. For a general discussion of a draft of the rules, see Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers*, *The Army Lawyer*, Feb. 1987, at 19.

<sup>2</sup> Rule 3.3, Candor Toward the Tribunal

(a) A lawyer shall not knowingly;

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(5) knowingly disobey an obligation or order imposed by a superior or tribunal, unless done openly before the tribunal in a good faith assertion that no valid obligation or order should exist.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

<sup>3</sup> The Model Code of Professional Responsibility (1980) previously governed the ethical conduct of Army lawyers.

<sup>4</sup> As of this writing, fewer than half of the states have adopted the Model Rules.

<sup>5</sup> This was based on the ABA's interpretation of a lawyer's ethical obligation under DR 7-102(A) of the Model Code of Professional Responsibility, see ABA Standards for Criminal Justice, 4-7.7 (2d ed. 1980). Although not all courts have accepted this procedure as adequate (see *Nix v. Whiteside*, 475 U.S. 157 (1986)), the Court of Military Appeals cited the ABA standards in *United States v. Radford*, 14 M.J. 322 (C.M.A. 1982), and the Army Court of Military Review did not question the appropriateness of the procedure in *United States v. Elzy*, 22 M.J. 640 (A.C.M.R. 1986).



not permitted. Once disclosure had been made, the burden shifts to the tribunal to determine what action will be taken.

The primary advantage of Rule 3.3 is that it prescribes a clear course of conduct for counsel faced with the problem of client perjury. For the military attorney, however, the rule presents certain unique problems. There may be a conflict between the ethical obligations imposed by the Army Rules and the applicable rule from the jurisdiction in which the attorney is admitted to practice. If a problem should arise, the attorney is advised to the extent practicable to consult with his or her supervisory attorneys and the appropriate bar's ethical committee. The Army Rules themselves give no guidance as to what counsel should do in cases where a conflict exists between the Army Rules and the rule applied in the jurisdiction to which the attorney is admitted. There are, however, two arguments that could be made in support of following the Army Rules: first, federal law preempts state law where there is a conflict; and second, the law of the forum (court-martial) should govern.

Potentially the most troublesome aspect of the new rule is its use of the word "tribunal." The Army Rules define the term as including "all fact-finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law."<sup>6</sup> This definition would seem to potentially include both Article 32 proceedings<sup>7</sup> and administrative elimination hearings.<sup>8</sup>

Counsel must be sure the offered testimony is in fact perjured before making any disclosures to the court. Merely not believing a client's story is not enough, and unless the client has specifically indicated an intent to commit perjury, the lawyer should thoroughly investigate and confront the client before disclosure.

Although disclosure may make continued representation of the client impossible, defense counsel should be mindful that the attorney-client privilege is waived only to the extent necessary to keep a fraud from being perpetrated on the tribunal. Captain James E. O'Hare.

## *United States v. Smith: What Does It Mean?*

The purpose of this note is to explain a brief order of the Court of Military Appeals in *United States v. Smith*,<sup>9</sup> which is of value to those trial defense counsel seeking to suppress evidence of a client's civilian conviction. The *Smith* order reversed the decision of the United States Army Court of Military Review and ordered a sentence rehearing because the military judge improperly admitted evidence of a civilian "conviction." The order's importance cannot be understood, however, without a bit of explanation.

Private First Class Freddie B. Smith was tried and convicted for drug-related offenses.<sup>10</sup> During the sentencing portion of the trial, the government offered into evidence a copy of Smith's plea of guilty to two adult offenses under Georgia law<sup>11</sup> for which he had been placed on probation under Georgia's "first offender" treatment program.<sup>12</sup> Over defense objection, the military judge admitted a record of the civilian "conviction" and permitted the government to call Smith's Georgia probation officer to testify regarding Smith's rehabilitative potential. On appeal to the Army court, appellate defense counsel argued that the admission of evidence of Smith's pleas at the civilian trial was prejudicial error because the pleas were not a "conviction" for the purposes of R.C.M. 1001(b)(3)(A).<sup>13</sup> This rule requires that the military judge look to the law of the civilian jurisdiction to determine whether or not there has been a "conviction." Under the Georgia first offender statute, and Georgia case law,<sup>14</sup> there is no "conviction" until an adjudication of guilt has been entered; therefore, there was no conviction pending Smith's probationary period. Appellate defense counsel further argued that probation was not equivalent to a sentence being adjudged. The Army Court of Military Review rejected Smith's argument (apparently agreeing with the trial judge that appellant's probationary period was the equivalent of an appeal) and affirmed the findings of guilty and sentence.<sup>15</sup> Subsequently, the Court of Military Appeals reversed without explanation. Although the *Smith* order is not of precedential value and does not expressly state that first offender "convictions" are not "convictions" within the meaning of R.C.M. 1001(b)(3)(A), trial defense counsel can cite *Smith* to preserve the issue for

<sup>6</sup> Although the term is not defined within the context of Army Rule 3.3, it is included in the definitions section of the Army Rules.

<sup>7</sup> Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ]. Although relatively few clients testify at Article 32 investigations, the situation may arise that a client will seek to use the occasion to commit perjury. Attorneys will be understandably reluctant to disclose the fact that the client has lied to an officer who is not a lawyer (especially when that officer could theoretically recommend additional charges). The common analogy made between Article 32 proceedings and grand juries is not applicable as individuals generally appear before grand juries without benefit of counsel. Assuming disclosure is required, defense counsel should be able to make a credible argument that a new Article 32 officer should be appointed.

<sup>8</sup> As this note deals exclusively with client perjury in the context of criminal proceedings, it should not be deemed to be authority for the applicability (or nonapplicability) of Army Rule 3.3 to administrative boards or other non-criminal proceedings.

<sup>9</sup> CMA 55,927/AR (C.M.A. 14 Sept. 1987) (summary disposition). The order cites as authority *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987), where the Court of Military Appeals held that a juvenile "conviction" was not a "conviction" within the meaning of Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(3)(A) [hereinafter R.C.M.]. The order in *Smith* goes one step beyond *Slovacek*, which involved juvenile "convictions." See Note, *Wild Youth to Stay Buried in the Past*, *The Army Lawyer*, Aug. 1987, at 35.

<sup>10</sup> The court-martial charges alleged wrongful possession of marijuana with the intent to distribute, wrongful distribution of marijuana, and conspiracy to possess and distribute marijuana, in violation of UCMJ arts. 112a and 81.

<sup>11</sup> The civilian offenses were possession with intent to distribute marijuana and carrying a concealed weapon.

<sup>12</sup> Ga. Code Ann. § 42-8-60 (1982). This statute provides inter alia that in the case of a first offender, the trial judge may, without entering a judgment of guilt, defer proceedings and place the defendant on probation.

<sup>13</sup> R.C.M. 1001(b)(3)(A) provides that: "The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule there is a 'conviction' in a court-martial case when a sentence has been adjudged." With respect to civilian convictions, the drafters explained that "[w]hether an adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction." R.C.M. 1001(b)(3)(A) analysis.

<sup>14</sup> *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

<sup>15</sup> CM 448417 (A.C.M.R. 1 July 1986).

appellate review. Trial defense counsel should rely upon the law of the particular civilian jurisdiction as the key to admission or exclusion of civilian convictions. As shown in *Smith*, an improper admission of such "convictions" will

not necessarily be considered harmless error—even where the convening authority takes action reducing the sentence below that adjudged at trial.<sup>16</sup> Captain Jon W. Stentz.

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<sup>16</sup> The military judge sentenced Smith to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement, the convening authority reduced the term of confinement to three years and six months, but otherwise approved the sentence.

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## Government Appellate Division Notes

### From *Treacle* to *Thomas*: The Evolution of the Law of Unlawful Command Influence

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On February 23, 1987, the United States Supreme Court denied certiorari in the 3d Armored Division (AD) command influence cases of *United States v. Thomas*<sup>1</sup> and *United States v. Jones*.<sup>2</sup> While a number of 3d AD command influence cases are still pending before the Army Court of Military Review<sup>3</sup> and the U.S. Court of Military Appeals,<sup>4</sup> their disposition will be controlled by the Court of Military Appeals' *Thomas*<sup>5</sup> decision and are unlikely to further define the law.<sup>6</sup> It is, therefore, an appropriate time to assess the impact of the 3d AD cases on the evolution of the law of unlawful command influence and to speculate on what further developments might occur.

On October 28, 1983, when the first appeal alleging unlawful command influence in the 3d AD<sup>7</sup> was filed by the Army's Defense Appellate Division, the Air Force Court of Military Review's decision in *United States v. Rodriguez*<sup>8</sup> was the most recent pronouncement on the topic of unlawful command influence or control.<sup>9</sup> *Rodriguez* and three Court of Military Appeals cases that preceded it, *United States v. Blaylock*,<sup>10</sup> *United States v. Grady*,<sup>11</sup> and *United States v. Rosser*,<sup>12</sup> typify the "special solicitude"<sup>13</sup> then being accorded claims of command influence by the military courts.<sup>14</sup>

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\*This article was prepared while the author was at Government Appellate Division.

<sup>1</sup> 107 S. Ct. 1289 (1987).

<sup>2</sup> 107 S. Ct. 1288 (1987).

<sup>3</sup> As of July, 1987, approximately 29 cases were pending various dispositions.

<sup>4</sup> As of July, 1987, approximately 10 cases were pending various dispositions.

<sup>5</sup> 22 M.J. 388 (C.M.A. 1986).

<sup>6</sup> On June 17, 1987, two command influence cases, *United States v. Cruz* and *United States v. Levite*, were orally argued before the Court of Military Appeals. The disposition of those cases could affect a change in the law of command influence. See *infra* notes 75-81 and accompanying text.

<sup>7</sup> *United States v. Anderson*, CM 444335 (Oct. 28, 1983). Because the focus of this article is on the developments in the law of command influence brought about by the 3d AD litigation, and not on the salient facts of the 3d AD controversy itself, a detailed factual recitation is not provided. Those interested in a summary of the facts should read part II of *United States v. Treacle*, 18 M.J. 646, 649-52 (A.C.M.R. 1984) (en banc).

<sup>8</sup> 16 M.J. 740 (A.F.C.M.R. 1983).

<sup>9</sup> The term "unlawful command influence" was not in vogue when Article 37, Uniform Code of Military Justice, 10 U.S.C. § 837 (1982) [hereinafter UCMJ] (unlawfully influencing action of court), was enacted in 1950. The popular phraseology was "command control." See generally War Dept., Report of Advisory Committee on Military Justice (1946) (this report is commonly referred to as the Vanderbilt Report).

<sup>10</sup> 15 M.J. 190 (C.M.A. 1983).

<sup>11</sup> 15 M.J. 275 (C.M.A. 1979).

<sup>12</sup> 6 M.J. 267 (C.M.A. 1979).

<sup>13</sup> *Blaylock*, 15 M.J. at 193.

<sup>14</sup> Judge Miller's concurring opinion in *Rodriguez* was, however, clearly a departure from the expansive view then afforded command influence allegations. Judge Miller declined to characterize the conduct of the squadron commander in *Rodriguez* as unlawful command influence, believing "unlawful command influence" to be a term of art, the usage of which should be confined to a description of those activities prohibited by Article 37, UCMJ. *Rodriguez*, 16 M.J. at 743. Though he concurred in the majority's decision to set aside the findings and sentence and order a rehearing, Judge Miller focused on the potential deprivation of witnesses. While Judge Miller did not refer to Article 46 (opportunity to obtain witnesses and other evidence) or U.S. Const., amend. VI, it is apparent that he engaged in a due process analysis in arriving at his position.



This special sensitivity grew out of the command abuses of World War II<sup>15</sup> and the vociferous outcry of various veterans organizations and bar associations that followed.<sup>16</sup> This, in turn, led to the enactment of Article 37, UCMJ, in 1950<sup>17</sup> and its broad construction by military courts. Following its initial interpretation of Article 37, in *United States v. Littrice*,<sup>18</sup> the Court of Military Appeals consistently held that any circumstance that gave even the appearance of improperly influencing courts-martial proceedings was to be condemned.<sup>19</sup> Describing command influence as a "spectre,"<sup>20</sup> and its effect on military justice, discipline, and morale as "pernicious,"<sup>21</sup> the court determined that specific prejudice to the rights of an accused was not required for relief<sup>22</sup> and that the mere appearance of command influence gave rise to a rebuttable presumption of prejudice.<sup>23</sup> This presumption could only be overcome by clear and positive evidence.<sup>24</sup> Moreover, the doctrine of waiver was held inapplicable to claims of improper command influence.<sup>25</sup> The highly favored status accorded command influence claims derived from the court's desire to maintain public confidence in the military justice system,<sup>26</sup> and the perception of unlawful command influence as nebulous and ephemeral.<sup>27</sup>

On June 29, 1984, the Army court, sitting en banc, issued its seminal 3d AD opinion<sup>28</sup> in the case of *United States v.*

*Treacle*.<sup>29</sup> The court determined that Major General (MG) Anderson, the convening authority and 3d AD commander, had only an official interest in Treacle's case and was not, therefore, an accuser within the meaning of Article 1(9), UCMJ, so that his disqualification from the referral process was required.<sup>30</sup> In its analysis the court relied on *United States v. Gordon*<sup>31</sup> and well-settled law.

As to findings and sentence, the Army court utilized a conventional command influence analysis derived from *United States v. Rosser* and other precedent. Holding that Article 37 prohibited coercion or unauthorized influence on actual or prospective witnesses with respect to the content of their testimony, the court concluded that a finding that unlawful pressure had been brought to bear in violation of Article 37 triggered a rebuttable presumption that the recipient of the unlawful pressure was in fact influenced.<sup>32</sup> While acknowledging that there was no direct evidence that any potentially favorable character witness for Treacle was influenced by MG Anderson's comments, the Army court nonetheless assumed that Treacle was deprived of favorable character evidence.<sup>33</sup> The court then examined the facts and circumstances surrounding Treacle's pleas and found by clear and convincing evidence that Treacle would have entered his negotiated pleas with or without additional

<sup>15</sup> During World War II, there were approximately two million courts-martial convened, or about one for every eight soldiers. The services averaged more than sixty general court-martial convictions for every day the war was fought. Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 Mil. L. Rev. 1, 11 (1987). The case of *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947), is an oft-cited example of the command abuses that occurred during that period. Lieutenant Shapiro was appointed to defend before a court-martial an American soldier of Mexican descent who was charged with assault with intent to commit rape. In order to demonstrate the mistake in identification by the prosecuting witnesses, the plaintiff substituted another American soldier of Mexican descent for the accused at the court-martial. This substitute was identified by the prosecuting witnesses as the attacker and was convicted. Shapiro then informed the court of the deception that he had practiced, whereupon the real defendant was brought to trial, also identified as the attacker, and convicted and sentenced. Several days later Lieutenant Shapiro, the plaintiff, was arrested. A day or two after, at 12:40 p.m., he was served with charges of effecting a delay in the orderly progress of the general court-martial. He was then notified that he would be tried at 2 p.m. on the same day, and was actually brought to trial at that time, at a place 35 to 40 miles from the place where he had been served with the charges. Shortly after his arrest, plaintiff requested the services of Captain James J. Mayfield to represent him, but this officer was named, in the order preferring charges, as the trial judge advocate. There being but 1 hour and 20 minutes in which to select counsel and prepare for trial, Lieutenant Shapiro thereupon selected as his defense counsel two lieutenants, neither of whom was a lawyer. When the court-martial convened, the plaintiff moved for a continuance of seven days on the ground that his counsel had not had sufficient time to prepare his defense. The motion was denied. He was convicted at 5:30 that afternoon and was sentenced to be dismissed from the service.

<sup>16</sup> Mr. Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association of the City of New York, echoed the sentiments of many when he testified before Congress concerning the proposed Uniform Code of Military Justice that, "We have felt for a long time, in fact all the way through our studies of this problem, that the question of command control was perhaps the most vital single point in military justice reform." *Uniform Code of Military Justice, 1950: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 626 (1949).*

<sup>17</sup> Uniform Code of Military Justice, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

<sup>18</sup> 3 C.M.A. 487, 13 C.M.R. 43 (1953).

<sup>19</sup> See *Grady*, 15 M.J. at 276; *Rosser*, 6 M.J. at 271; *United States v. Hawthorne*, 7 C.M.A. 293, 297, 22 C.M.R. 83, 87 (1956).

<sup>20</sup> *Grady*, 15 M.J. at 276.

<sup>21</sup> *United States v. Karlson*, 16 M.J. 469, 474 (C.M.A. 1983).

<sup>22</sup> See *Rosser*, 6 M.J. at 271. But see *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985) (en banc). In *Cruz*, the Army court, after a review of numerous command influence decisions, concluded that *Rosser* was the only case to accord an appellant relief without finding (at least tacitly) actual prejudice. *Id.* at 882.

<sup>23</sup> *United States v. Johnson* 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964).

<sup>24</sup> *Rosser*, 6 M.J. at 272; *United States v. Adamiak*, 4 C.M.A. 412, 418, 15 C.M.R. 412, 418 (1954).

<sup>25</sup> *Blaylock*, 15 M.J. at 193; *United States v. Ferguson*, 5 C.M.A. 68, 82, 17 C.M.R. 68, 82 (1954) (Quinn, C.J., concurring).

<sup>26</sup> *Grady*, 15 M.J., at 276; *Rosser*, 6 M.J. at 273; *United States v. Navarre*, 5 C.M.A. 32, 43, 17 C.M.R. 32, 43 (1954).

<sup>27</sup> As stated by the Court of Military Appeals in *Karlson*, 16 M.J. at 474, unlawful command influence "may assume many forms, may be difficult to uncover, and affects court members in unsuspecting ways." Contrast *United States v. Calley*, 46 C.M.R. 1131, 1160 (A.C.M.R. 1973) ("Influence in the air, so to speak, is a contradiction in terms. An object and effect upon the object must be identified for influence to exist.").

<sup>28</sup> To date, litigation of the 3d AD command influence issue by the Army court has resulted in 36 published opinions.

<sup>29</sup> 18 M.J. 646 (A.C.M.R. 1984) (en banc).

<sup>30</sup> 18 M.J. at 655.

<sup>31</sup> 1 C.M.A. 255, 2 C.M.R. 161 (1952).

<sup>32</sup> 18 M.J. at 657.

<sup>33</sup> *Id.*

character evidence.<sup>34</sup> The presumption of prejudice accorded Treacle was therefore rebutted and the finding of guilty was upheld.<sup>35</sup> His sentence was set aside and a rehearing ordered, however, after it was determined that the court members discussed MG Anderson's policies during the trial and that at least one member of Treacle's court-martial understood MG Anderson's comments as discouraging favorable character testimony.<sup>36</sup> Under the circumstances, the Army court concluded that the presumption of improper influence had not been rebutted and, thus, the sentence could not stand.<sup>37</sup>

While the Treacle opinion embodied the special solicitude accorded command influence allegations, the Army court's opinion in *United States v. Yslava*<sup>38</sup> less than two weeks later represented a departure of sorts from traditional analysis. The court did not apply a presumption of prejudice and did not reference the "clear and positive" quantum of evidence normally required to rebut such a presumption. Rather, the court concluded, under the facts of the case, that no realistic possibility existed that unlawful influence affected Yslava's court-martial and that Yslava suffered no prejudice as to findings and sentence.<sup>39</sup> The Army court also found that, while defense counsel's averment of no prejudice at trial did not constitute waiver of the command influence issue, such an averment was entitled to "significant weight" in determining the existence of prejudice.<sup>40</sup>

While Yslava portended a shift away from the "appearance of influence-prejudice presumed" analytical framework exemplified by Treacle, the Army court's subsequent decision in *United States v. Schroeder*<sup>41</sup> and other 3d AD cases<sup>42</sup> reaffirmed the Army court's adherence to the traditional analytical model.

Approximately a year after Yslava, the Army court, once again sitting en banc to resolve an allegation of unlawful command influence, this time in the 1st Armored Division, decided *United States v. Cruz*.<sup>43</sup> In a lengthy and complex opinion, the Army court re-examined a number of command influence cases,<sup>44</sup> developed a thesis as to command influence law, and constructed an elaborate bifurcated analytical model.

The Army court's thesis was that resolution of a command influence allegation involved a two-tiered analysis: whether the accused was prejudiced by actual command influence; and whether there existed in the minds of the public<sup>45</sup> the appearance that the accused was prejudiced by actual unlawful command influence.<sup>46</sup> The Army court noted that in resolving the issue of actual command influence, the court was, in essence, determining the fairness of the trial, while resolution of the appearance of unlawful command influence involved the court's responsibility to safeguard the military justice system from loss of public confidence.<sup>47</sup>

The appellate model created by the Army court for resolving the question of actual command influence initially accorded cases on review a rebuttable presumption of correctness and regularity.<sup>48</sup> The burden of persuasion<sup>49</sup> was placed on an appellant to produce sufficient evidence<sup>50</sup> of an error affecting the validity of the findings or sentence to shift the burden of persuasion to the government. While retaining the rebuttable presumption that an individual exposed to unlawful command influence was, if fact, influenced,<sup>51</sup> the Army court required an appellant to make a showing that the person presumed to be influenced had some particular knowledge relevant to the appellant's case, that the particular knowledge was relevant to some material

<sup>34</sup> *Id.* at 658.

<sup>35</sup> *Id.* at 658.

<sup>36</sup> *Id.* at 658-59.

<sup>37</sup> *Id.* at 658-59.

<sup>38</sup> 18 M.J. 670 (A.C.M.R. 1984) (en banc).

<sup>39</sup> *Id.* at 672-73.

<sup>40</sup> *Id.* at 673.

<sup>41</sup> 18 M.J. 792 (A.C.M.R. 1984).

<sup>42</sup> See generally *United States v. Neblett*, 20 M.J. 833 (A.C.M.R. 1985); *United States v. Addison*, 19 M.J. 941 (A.C.M.R. 1985); *United States v. Mitchell*, 19 M.J. 905 (A.C.M.R. 1985); *United States v. Carter*, 19 M.J. 808 (A.C.M.R. 1985); *United States v. Abelon*, 19 M.J. 767 (A.C.M.R. 1984); *United States v. Bakken*, 19 M.J. 757 (A.C.M.R. 1984); *United States v. Thompson*, 19 M.J. 690 (A.C.M.R. 1984); *United States v. Alexander*, 19 M.J. 614 (A.C.M.R. 1984); *United States v. Southers*, 18 M.J. 795 (A.C.M.R. 1984); *United States v. Hill*, 18 M.J. 757 (A.C.M.R. 1984).

<sup>43</sup> 20 M.J. 873 (A.C.M.R. 1985) (en banc), petition granted, 22 M.J. 100 (C.M.A. 1986).

<sup>44</sup> See *supra* n.22.

<sup>45</sup> The Army court drew a distinction between the perceptions of a participant in the military justice system, such as a court member or potential witness, and the appearance of unlawful command influence. The Army court noted that the perceptions of a participant, even if inaccurate, could result in actual command influence if the participant acted in accordance with his or her misperception. The appearance of unlawful influence does not focus on the actual affect on the trial proceedings, but rather, the public's belief as to what occurred. 20 M.J. at 883.

<sup>46</sup> The Army court believed that concerns over the appearance of unlawful command influence would normally become relevant only in the absence of actual command influence. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 884.

<sup>49</sup> The author submits that the Army court was incorrect in referring to appellant's burden as the burden of persuasion. Burden of proof encompasses two concepts: burden of persuasion, which ordinarily never shifts between parties; and burden of production (often referred to as the burden of going forward), which may shift back and forth. Black's Law Dictionary 178 (5th ed. 1979). In the author's view, the burden of persuasion never shifts from the government and is initially satisfied by the presumption of regularity. Appellant then bears the burden of producing evidence sufficient to overcome the presumption. If the presumption is rebutted, the burden of production shifts to the government to produce evidence sufficient to satisfy its burden of persuasion.

<sup>50</sup> The Army court determined that in order to overcome the presumption of regularity, appellant was required to produce evidence that, considering the totality of the circumstances, was sufficient to allow a reasonable person to conclude that actual unlawful command influence affected appellant's case. The mere possibility of prejudice would not be sufficient to overcome the presumption of regularity. 20 M.J. at 886.

<sup>51</sup> *Id.* at 887 (citing Treacle).

aspect of the case, and that its absence caused substantial harm.<sup>52</sup> Relief in the case of actual command influence, therefore, depended on whether the appellant suffered specific prejudice.<sup>53</sup>

Independent of the fair trial concerns inherent in the specific prejudice analysis, the second prong of the Army court's analytical model focused on the interest of the military justice system in avoiding the appearance of unlawful command influence. The Army court concluded that in the vast majority of cases, the process of appellate review was sufficient to ensure public confidence in the fundamental fairness of a trial.<sup>54</sup> While the Army court considered the reversal of findings or sentence an "unmerited windfall" in the absence of actual prejudice, the court did not preclude the possibility as a "last resort when no other feasible course of action [would] restore public confidence."<sup>55</sup>

The *Cruz* analytical model was intended to provide "a systematic methodology, constructed from the principles laid down by the Court of Military Appeals, for the resolution of unlawful command influence cases."<sup>56</sup> Well-intentioned, the *Cruz* opinion was, nonetheless, an unwieldy attempt to advance the law of command influence while remaining anchored to long-established case precedent. The Army court's cautious advancement of the law of command influence can hardly be faulted, however, given the firmly entrenched special solicitude then accorded command influence allegations. Indeed, given the current state of the law, the significance of *Cruz* in the evolution of the law of command influence cannot be gainsaid, for *Cruz* clearly identified what has become the linchpin of command influence analysis—the nexus requirement.<sup>57</sup> Unlike *Treacle*, where a nexus between MG Anderson's comments and their effect on potential witnesses was never established, but

assumed to have occurred,<sup>58</sup> *Cruz* correctly recognized that improper external influences having no actual impact on a court-martial proceeding cannot logically be said to have adversely affected the accused's right to a fair trial. While the *Cruz* opinion was a compromise between long-standing precedent and a harmless error analysis, its critical focus on specific prejudice was an important advancement towards adoption of a due process analytical model. It remained for the Court of Military Appeals to openly embrace a due process analysis for command influence allegations.

On September 22, 1986, in an opinion that signaled a dramatic reformation of the law of command influence, the Court of Military Appeals decided the 3d AD case, *United States v. Thomas*.<sup>59</sup> Abandoning its own precedent except for references to *United States v. Karlson*<sup>60</sup> and *United States v. Accordino*,<sup>61</sup> the court equated unlawful command influence to due process violations<sup>62</sup> and applied a harmless error analysis based on Supreme Court case law<sup>63</sup> and *United States v. Remai*.<sup>64</sup> The court noted that the exercise of unlawful command influence tended to deprive an accused soldier of his or her constitutional rights, and that command influence, like prosecutorial misconduct, involved "a corruption of the truth-seeking function of the trial process."<sup>65</sup> In holding that, in cases where unlawful command influence has been exercised, no reviewing court could properly affirm the findings and sentence unless it was persuaded beyond a reasonable doubt that the findings and sentence were not affected by the command influence, the court adopted a clearly defined constitutional harmless error test that did not rely on presumptions, assumptions, or appearances.<sup>66</sup> In order to properly raise the issue of unlawful command influence, the court placed the burden

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 886 n.18. The Army court proffered its belief that a rule of general prejudice was inappropriate in cases involving unintentional violations of Article 37, UCMJ. Though the Court of Military Appeals has yet to expressly reject the doctrine of general prejudice, that court's decision in *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), and its summary dispositions in *United States v. Yslava*, 23 M.J. 159 (C.M.A. 1986) and *United States v. Poronto*, 24 M.J. 344 (C.M.A. 1987), would seem to indicate that the doctrine is disfavored.

<sup>54</sup> 20 M.J. at 889.

<sup>55</sup> *Id.* at 890.

<sup>56</sup> *Id.* at 891.

<sup>57</sup> *Id.* at 886-87, 888.

<sup>58</sup> 18 M.J. at 657.

<sup>59</sup> 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

<sup>60</sup> 16 M.J. 469 (C.M.A. 1983).

<sup>61</sup> 20 M.J. 102 (C.M.A. 1985).

<sup>62</sup> 22 M.J. at 393-94.

<sup>63</sup> The court relied on the following United States Supreme Court cases: *Hill v. Lockhart*, 474 U.S. 52 (1985); *United States v. Bagley*, 473 U.S. 667 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Chapman v. California*, 386 U.S. 18 (1967); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>64</sup> 19 M.J. 229 (C.M.A. 1985).

<sup>65</sup> 22 M.J. at 394.

<sup>66</sup> While the court noted that "[a]voidance of any appearance of evil provide[d] ample justification" for the Army court's decision to order new post-trial reviews in certain cases, 22 M.J. at 397, no special significance should be accorded this singular reference to a distinct aspect of the court-martial process not amenable to a due process analysis. A presumption of prejudice based solely on appearance is inconsistent with the *Thomas* requirement for particularized claims of prejudice and can no longer be considered valid.

upon an accused to articulate a specific claim of prejudice.<sup>67</sup>

Explicitly and implicitly, the *Thomas* decision recognized the transformation that has occurred in the military justice system<sup>68</sup> that made a change in the law possible. Though the issue of unlawful command influence is still accorded special concern,<sup>69</sup> the current justice system, with an independent trial judiciary,<sup>70</sup> defense counsel organization,<sup>71</sup> and direct review by civilian courts,<sup>72</sup> is much more efficient at identifying and resolving command influence claims than its predecessors.<sup>73</sup> The extensive litigation of the 3d AD command influence cases and the remedial actions taken by the Army courts<sup>74</sup> demonstrate the ability of the present military justice system to police itself and to correct instances of unlawful command influence when they arise.

While the law of command influence has evolved dramatically from the inception of the 3d AD litigation to the

*Thomas* decision, further developments will, in all probability, be incremental. On June 17, 1987, the Court of Military Appeals heard oral argument in two command influence cases, *United States v. Cruz*<sup>75</sup> and *United States v. Levite*.<sup>76</sup> The granted issue in *Cruz*<sup>77</sup> focused on the Army court's allocation of the burden of proof,<sup>78</sup> and resolution of this issue should provide a definition for the quantum of evidence required to properly raise the issue<sup>79</sup> of unlawful command influence. The specified issues<sup>80</sup> in *Levite* involve a reexamination of the expansive interpretation previously accorded Article 37, UCMJ, and a determination of the continued viability of the general prejudice doctrine.<sup>81</sup> These cases, when decided, should represent a fine tuning, so to speak, of *Thomas* and should not radically alter the *Thomas* analytical model.

In conclusion, the evolution of the law of command influence from the Court of Military Appeals' decision in

<sup>67</sup> The following quotes from the *Thomas* opinion are illustrative:

[W]e are unable to find in the records before us any accused who entered a guilty plea because of the unavailability of witnesses who, in the absence of General Anderson's interference, might have testified at trial. Certainly, no such claim has been brought to our attention.

The possibility that, if General Anderson had not interfered, an accused who entered pleas of guilty might have pleaded not guilty, introduced evidence, and obtained an acquittal is so remote that it does not disturb us—especially where no specific claim to this effect has been made.

22 M.J. at 395. "Moreover, absent some specific claim to the contrary, we shall not assume that an accused chose trial by judge alone because of concerns about the impartiality of the court members." *Id.* at 396. "[T]he doors of this Court remain open to hear particularized claims of prejudice." *Id.* at 400 (Cox, J. concurring).

<sup>68</sup> The court noted that a prime motivation in its own establishment was to provide a further bulwark against impermissible command influence. 22 M.J. at 393. The court also duly noted the safeguards surrounding the acceptance of guilty pleas, *id.* at 395, and the independence of judges, *id.* at 396.

<sup>69</sup> Referring to command influence as the mortal enemy of military justice, 22 M.J. at 393, and the "sacred dut[y]" of a commander to administer fairly the military justice system, *id.* at 400, the court voiced its concern that its opinion be construed as a tacit acceptance of illegal command influence. *Id.* While no reasonable reading of *Thomas* could lead to such a conclusion, the court's acute awareness of the adverse public perception of military justice that results from such command abuses and the court's willingness to consider "much more drastic measures" in the future, *id.*, clearly indicates the court's continued sensitivity to the command influence issue.

<sup>70</sup> Since the enactment of the Military Justice Act of 1968, military judges are assigned and directly responsible to The Judge Advocate General or his designee and are insulated from the convening authority or any member of his staff. 10 U.S.C. § 826(c) (Supp. III 1985).

<sup>71</sup> Since November 1980, all Army defense counsel have been part of the United States Army Trial Defense Service. See Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 6-2 (1 July 1984).

<sup>72</sup> The Court of Military Appeals, created by the enactment of the Uniform Code of Military Justice in 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950), defines its role as "civilian overseer" for the military justice system. *Thomas*, 22 M.J. at 400. Further, since passage of the Military Justice Act 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983), courts-martial have been subject to direct review by the United States Supreme Court.

<sup>73</sup> The Court of Military Appeals commended the Army court and appellate counsel for the careful scrutiny given each record of trial and the "surgical[]" removal of possible prejudice. *Thomas*, 22 M.J. at 400. The Army court, in turn, complimented the skill and diligence of the military judge and the members of the Army Trial Defense Service involved in investigating the command influence problem in the 3d AD. *United States v. Giarratano*, 20 M.J. 553, 556 n.8 (A.C.M.R. 1985) (Giarratano's court-martial lasted 14 days and involved 54 witnesses, 123 exhibits and over 1400 pages of testimony, nearly all of which was devoted to the command influence issue); *United States v. Treake*, 18 M.J. at 653 n.5.

<sup>74</sup> A completion of the various remedies fashioned by the Army court to resolve the 3d AD command influence cases is set forth in *Thomas*, 22 M.J. at 392. The relief granted included post-trial evidentiary hearings pursuant to *United States v. DuBay*, 317 C.M.A. 147, 37 C.M.R. 411 (1967), new reviews and actions by a different convening authority, rehearings as to findings and sentence, sentence rehearings, and sentence reassessments.

<sup>75</sup> 20 M.J. 873 (A.C.M.R. 1985) (en banc), petition granted, 22 M.J. 100 (C.M.A. 1986).

<sup>76</sup> CM 447749 (A.C.M.R. 27 Mar. 1986), petition granted, 23 M.J. 416 (C.M.A. 1987).

<sup>77</sup> Granted Issue I in *Cruz* is as follows: "Whether requiring appellant to produce evidence sufficient to establish specific prejudice and substantial harm before deeming the issue of command influence to be raised destroys the due process and fair trial protections of Article 37, UCMJ, and impermissibly shifts the burden of proof to appellant." 22 M.J. at 100.

<sup>78</sup> See *supra* note 49.

<sup>79</sup> The Court of Military Appeals, while imposing a threshold requirement that appellant properly raise the issue of improper influence, did not define the standard. *Thomas*, 22 M.J. at 396-97.

<sup>80</sup> The granted issues in *Levite* are as follows:

Whether actions impeding a court-martial in violation of Article 98, Uniform Code of Military Justice, 10 U.S.C. § 898, or violative of an accused's right to gather evidence in violation of Article 46, U.C.M.J., 10 U.S.C. § 846, but not committed by an officer empowered to convene courts-martial, amount to unlawful command influence under Article 37, U.C.M.J., 10 U.S.C. § 837.

If such acts do amount to unlawful command influence, must an accused demonstrate actual prejudice to warrant appellate reversal or should the doctrine of general prejudice apply?

23 M.J. at 416.

<sup>81</sup> See *supra* note 53.

*Littrice*<sup>82</sup> in 1953 to the Supreme Court's denial of certiorari in *Thomas*<sup>83</sup> in 1987 could not have occurred but for the maturation of the military justice system itself. *Thomas* is an acknowledgment of the military's ability and desire to zealously safeguard an accused soldier's right to a fair trial.

<sup>82</sup> 3 C.M.A. 487, 13 C.M.R. 43 (1953).

<sup>83</sup> 107 S. Ct. 1289 (1987).

<sup>84</sup> "[W]e wish to make it clear that incidents of illegal command influence simply must not recur in other commands in the future." *Thomas*, 22 M.J. at 400. It is unlikely that the Court of Military Appeals will prove to any better prognosticators than the Air Force Court of Military Review in 1983, when it declared that "an allegation of unlawful command influence is *rara avis*, and hopefully will soon be extinct." *Rodriguez*, 16 M.J. at 742.

Fervent hopes<sup>84</sup> aside, instances of unlawful command influence will occur in the future. Fortunately, the modern military justice system is quite capable of exposing and correcting such command abuses.

## Child Abuse and Hearsay: Doing Away With the Unavailability Rule

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### Introduction

In recent years, the military has seen an alarming growth in the number of trials involving charges of child sexual abuse.<sup>1</sup> Unfortunately, these crimes are particularly difficult to detect and prosecute.<sup>2</sup> Several reasons are usually advanced for this disturbing reality.

### Detection of Child Abuse

The majority of child sexual abuse in this country involves a "relative or close acquaintance of the child."<sup>3</sup> Consequently, this crime often goes unreported because there are few if any witnesses.<sup>4</sup> Additionally, the relationship between the child and the abuser often enables the abuser to cloak the assault in a secretive atmosphere.<sup>5</sup> In this setting, the child's fear of reprisal by the abuser, and fear that disclosure of the assault might be met with punishment or disbelief, also operates to discourage some victims from reporting the crime.<sup>6</sup>

### Proving Child Abuse is Often a Difficult Process

Force is not used in many reported child sexual abuse cases. Consequently, physical evidence is minimal or nonexistent. This is disturbing because in many trials such corroborating evidence is often necessary to obtain a conviction.<sup>7</sup>

In addition to the absence of eyewitnesses and the lack of physical evidence, trial counsel must also overcome the fact that child victims often possess limited cognitive and verbal skills, and thus may lack credibility.<sup>8</sup> Although young children may be unable to articulate their story as well as an adult, however, it does not necessarily follow that a child's account of an event is less reliable.<sup>9</sup> In fact, such statements from child victims have been held "intrinsically reliable" by some courts and commentators for two reasons: children generally will not persist in lying to their parents or other figures of authority about sexual abuse; and young children normally lack sufficient knowledge about sexual matters to lie about them.<sup>10</sup> Unfortunately, while young children may be competent and persuasive witnesses, in some cases the child victim may simply be unwilling or unable to testify in court concerning the abuse. Under these circumstances, the trial counsel is often left with a case built almost entirely on hearsay. This situation also arises when the trial counsel elects not to call the child victim for tactical reasons. There are several reasons why trial counsel might make such a decision. First, the victim's underdeveloped cognitive and verbal skills may make the child appear incredible to the fact-finder, or result in adding little or nothing to the truth-determining process.<sup>11</sup> Second, the time interval between the incident and trial may adversely affect the victim's ability to recall specific events. Accordingly, trial counsel may wish to present the child

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<sup>1</sup> Note, *Child Abuse and Hearsay*, *The Army Lawyer*, Feb. 1985, at 39.

<sup>2</sup> Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983).

<sup>3</sup> *Id.* at 1750.

<sup>4</sup> *Id.* at 1745.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1750 n.46.

<sup>7</sup> *Id.* at 1750.

<sup>8</sup> *Id.* at 1746.

<sup>9</sup> *Id.* at 1751.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1745-46, 1750-52.

victim's original and thus most accurate account.<sup>12</sup> Third, the child may have rendered several accounts of the incident. Because the one closest in time to the sexual assault is usually the most reliable, trial counsel may seek to introduce only the first statement made by the child, rather than the child's possibly conflicting testimony.<sup>13</sup> Fourth, trial counsel may wish to spare the child the additional stress and stigmatism that often accompanies testifying at trial to such indecent acts.<sup>14</sup> Finally, there may be instances where the child, perhaps from family pressure, may be reluctant or even refuse to testify.<sup>15</sup>

Assuming that trial counsel elects not to call the child victim as a witness, counsel must be prepared to address the sixth amendment confrontation issue that arises from that decision.

### Hearsay and the Confrontation Clause—Civilian Practice

One of the most confusing issues arising under the sixth amendment is the relationship between the confrontation clause and the law of hearsay. The Supreme Court has never found a congruence between the law of hearsay and the confrontation clause, even though they are seen as protecting similar values.<sup>16</sup> Consequently, evidence admissible under the hearsay rule may still violate the confrontation clause.

In 1980, the Supreme Court, in *Ohio v. Roberts*,<sup>17</sup> appeared to promulgate an absolute unavailability requirement applicable to all hearsay statements. The court stated: "In the usual case . . . , the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant."<sup>18</sup>

This unavailability requirement had sweeping potential ramifications. If applied broadly, it would have severely inhibited the use of numerous hearsay exceptions that have traditionally been available. For example, all of the exceptions to the hearsay rule embodied in Federal Rule of Evidence 803, and its military counterpart, Military Rule of Evidence 803, would require a showing of the unavailability of the declarant as a prerequisite to admissibility under the rule, where previously the availability of the declarant had been immaterial.

After *Roberts* was announced, several lower courts followed this broad interpretation and required a showing of unavailability of the declarant before any hearsay statements could be received in evidence.<sup>19</sup> This trend, however, should have ended when the Supreme Court explained in *United States v. Inadi*<sup>20</sup> that it had not intended for its opinion in *Roberts* to be read so broadly:

Under this interpretation of *Roberts*, no out-of-court statement would ever be admissible without a showing of unavailability.

*Roberts*, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. *Roberts* itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay. "The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.''" The Court in *Roberts* remained "[c]onvinced that 'no rule will perfectly, resolve all possible problems'" and rejected the "invitation to overrule a near-century of jurisprudence" in order to create such a rule. In addition, the Court specifically noted that a "demonstration of unavailability . . . is not always required." In light of these limiting statements, *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial."<sup>21</sup>

The *Inadi* case involved the propriety of introducing into evidence the out-of-court statements of a non-testifying co-conspirator pursuant to Fed. R. Evid. 801(d)(2)(E), where the unavailability of the declarant had not been shown. The Court held that the confrontation clause did not require a showing of unavailability as a condition to admission of the out-of-court statements of a non-testifying co-conspirator,

<sup>12</sup> *Id.* at 1750-51.

<sup>13</sup> *Cf. id.* at 1752 (children under the stress of trial "often give confused and inaccurate answers").

<sup>14</sup> *Id.* at 1751-52.

<sup>15</sup> *Cf. United States v. Hines*, 23 M.J. 125, 131-32 (C.M.A. 1986) (evidence of family pressure on the victimized children not to testify against their stepfather may waive or excuse the absence of in-court confrontation).

<sup>16</sup> See generally *Hines*, 23 M.J. at 127-31 (although the exceptions of the hearsay rule ensure that only trustworthy hearsay is presented to the factfinder, the confrontation clause expresses a preference for in-court testimony). Consequently, if "[r]ead literally the Confrontation Clause would eliminate any and all exceptions to the hearsay rule where the declarant did not testify. However, the Supreme Court has never taken such an extreme position." *Id.* at 128-29 (citations omitted). Accordingly, in those situations where an unavailable declarant does not testify in court, the proffered hearsay must "bear 'indicia of reliability' such that 'there is no material departure from the reason of the general rule' [i.e., the rational under confrontation clause]." *Id.* at 131. See also *id.* at 128 n.6 (Does this rule hold for hearsay offered where an available witness does not testify in court? This question is discussed later in this article.) See generally *Ross, Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 Mil. L. Rev. 31 (1987).

<sup>17</sup> 448 U.S. 56 (1980). In *Bourjailly v. United States*, 107 S. Ct. 2775 (1987), the Court stated that *Roberts* provides the general approach.

<sup>18</sup> 448 U.S. at 65.

<sup>19</sup> See, e.g., *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); *Haggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).

<sup>20</sup> 106 S. Ct. 1121 (1986).

<sup>21</sup> *Id.* at 1125 (citations omitted).



who neither the prosecution nor the defense wanted to examine at trial, and whom the defense could have called and cross examined if the defendant so desired.<sup>22</sup>

The impact of *Inadi* has yet to be accurately gauged. For example, despite *Inadi*'s rejection of a broad interpretation of the Court's opinion in *Roberts*, the Arizona Supreme Court, in *State v. Robinson*,<sup>23</sup> relied in part on a trial court's ruling that a child declarant was unavailable due to mental infirmity, as part of its rationale for holding that evidence admitted under a rule of evidence similar to Mil. R. Evid. 803(4), 803(24) and 804(b)(5) did not violate the confrontation clause.<sup>24</sup>

Holdings like that in *Robinson* cloud the issue of whether trustworthy evidence admissible under rules similar to Mil. R. Evid. 803 can be admitted where the declarant is available to testify.<sup>25</sup> As previously indicated, *Inadi* authorizes the government, in lieu of calling an available declarant, to present its case based upon hearsay similar to that discussed in Mil. R. Evid. 803. The defense is thereby forced to call the declarant as its witness pursuant to rules similar to Mil. R. Evid. 806 or to waive the issue.

*Inadi* and *Robinson* differ on how to satisfy the requirements of the confrontation clause where the declarant is available to testify. *Inadi* did not address the reliability of the proffered hearsay and seems to place a burden on the defense to call the declarant as its witness subject to cross examination. *Robinson*, on the other hand, seems to place a burden on the government to demonstrate that if the declarant were called as a witness, the testimony elicited would be of little benefit to the proceedings. How future cases will resolve the clash between the exceptions to the hearsay rule and the confrontation clause is uncertain, but the battle lines seem clearly drawn.

#### Hearsay and the Confrontation Clause—Military Practice

In the military arena, there are also different approaches to the clash between the exceptions to the hearsay rule and the confrontation clause. For purposes of this article, five opinions merit discussion.

In *United States v. Arnold*,<sup>26</sup> The Army Court of Military Review held that two of three hearsay statements were erroneously admitted under Mil. R. Evid. 803(2) (excited utterance) and 803(24) (residual hearsay), where the thirteen-year-old declarant was available, but did not testify.<sup>27</sup> The Army court applied a rationale similar to the broad interpretation of *Roberts*, but did not expressly base the opinion on that case.<sup>28</sup> Rather, the Army court focused on two factors: the victim's second statement, unlike her previous admissible excited utterance, was the "result of . . . urgings and questions," and therefore inadmissible under Mil. R. Evid. 803(2); and the language in Mil. R. Evid. 803(24)(B) "indicate[s] some necessity concerning [a showing of] unavailability."<sup>29</sup> Nevertheless, the Army court affirmed *Arnold*'s conviction, finding the error harmless in light of appellant's confession and the victim's admissible excited utterance.<sup>30</sup> The Court of Military Appeals has recently affirmed.<sup>31</sup>

The Army court next examined Mil. R. Evid. 803(24) in *United States v. Quick*.<sup>32</sup> *Quick*, unlike *Arnold*, was decided after the *Inadi* opinion was announced. Without acknowledging *Arnold*, the Army court held that hearsay under Mil. R. Evid. 803(24) was admissible even though the declarant was outside the courtroom and thus available to testify,<sup>33</sup> because the victim's statements possessed "'independent evidentiary significance' and [were] 'irreplaceable as substantive evidence.'"<sup>34</sup> Specifically, the Army court held that the child's statements were similar to those coming under both the excited utterance exception, Mil. R. Evid. 803(2), and the medical treatment exception, Mil. R. Evid. 803(4):

We find from the evidence of record that J's [the victim's] statements to her baby-sitter were made while J was still feeling some of the effects of the excitement caused by the previous evening's startling event. . . . While we do not hold that the statements were admissible under Rule 803(2), the circumstances under which they were rendered do speak strongly for their reliability.<sup>35</sup>

<sup>22</sup> *Id.* at 1129. See also *Deleware v. Fensterer*, 474 U.S. 15, 20 (1985) (the confrontation clause only guarantees an accused "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"); *United States v. Cree*, 778 F.2d 474, 478 (8th Cir. 1985); *United States v. Broadnax*, 23 M.J. 389, 393-94 (C.M.A. 1987); *United States v. Hines*, 23 M.J. 125, 128-29 n.6 (C.M.A. 1986); *United States v. Victor*, 10 M.J. 69, 78 (C.M.A. 1980) (Everett, C.J., concurring in the result); *United States v. Miller*, 23 C.M.A. 247, 250, 49 C.M.R. 380, 383 (1974); *United States v. Holman*, 23 M.J. 565, 567 (A.C.M.R. 1986); *United States v. Quick*, 22 M.J. 722, 725-26 (A.C.M.R. 1986), petition granted, 24 M.J. 49 (C.M.A. 1987); Mil. R. Evid. 806.

<sup>23</sup> 735 P.2d 801 (Ariz. 1987) (en banc).

<sup>24</sup> *Id.* at 813-15.

<sup>25</sup> See *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979). *Nick* predates *Roberts*, *Fensterer*, and *Inadi*. In *Nick*, the court held that the confrontation clause was not violated where a three-year-old declarant of reliable and otherwise admissible hearsay was not called to testify, in part, because the court concluded that cross examination would be of little benefit due to her "tender years." *Id.* at 1202.

<sup>26</sup> 18 M.J. 559 (A.C.M.R. 1984), *aff'd*, 25 M.J. 129 (C.M.A. 1987).

<sup>27</sup> See generally 18 M.J. at 560-62.

<sup>28</sup> See generally *id.*

<sup>29</sup> 18 M.J. at 561.

<sup>30</sup> 18 M.J. at 562.

<sup>31</sup> 25 M.J. 129 (C.M.A. 1987).

<sup>32</sup> 22 M.J. 722 (A.C.M.R. 1986), petition granted, 24 M.J. 49 (C.M.A. 1987). See also *United States v. Rousseau*, 21 M.J. 960, 963 (A.C.M.R.) ("Arnold . . . appears to run afoul of the clear language of the rule that availability is immaterial and, in fact makes Rules 803 and 804 redundant"), petition granted, 23 M.J. 176 (C.M.A. 1987).

<sup>33</sup> 22 M.J. at 725.

<sup>34</sup> *Id.* at 727.

<sup>35</sup> *Id.* at 724.

As to the similarity of the victim's statements to those coming under the medical treatment exception to the hearsay rule, the Army court said:

It is clear that when she [J] spoke to Mrs. Lightfoot, J was taking the opportunity to complain about the soreness in her vaginal area and thus was hoping to receive some form of treatment and relief. Individuals in need of such help, whether children or adults, have a strong incentive to be truthful . . . . Once again the circumstances speak strongly for reliability.<sup>36</sup>

In holding that the confrontation clause was not violated, the Army court noted that the defense was afforded the opportunity to call the declarant but declined.<sup>37</sup> This fact plus the indications in the record that the five-year-old declarant, if called, would have been "an unexpressive and inarticulate witness,"<sup>38</sup> led the Army court to the conclusion that the "utility of [in-court] confrontation would have been negligible."<sup>39</sup> Accordingly, the Army court, citing *Inadi*, *Fensterer*, *Nick*, and other federal opinions, held that the hearsay evidence was properly admitted.<sup>40</sup>

In *Quick*, the Army court blurred the *Fensterer/Inadi* "opportunity to confront" analysis and the *Roberts/Robinson* "unavailability" analysis but reached the same conclusion either theory would have led to if employed independently. The Court of Military Appeals has granted petition on these issues.<sup>41</sup>

How *Quick* will be decided by the Court of Military Appeals is an open question. In a trilogy of questions, however, *United States v. Hines*,<sup>42</sup> *United States v. Dunlap*,<sup>43</sup> and *United States v. Arnold*,<sup>44</sup> the Court of Military Appeals has swept aside the unavailability rule insofar as it applies to "hearsay statements that have classically been admitted without regard to the declarants' availability. . . .

See Mil. R. Evid. 803(1)-(23)."<sup>45</sup> This return to pre-*Roberts* practice is a major boon to trial counsel in the field. For example, assume that a child victim makes an excited utterance immediately after the alleged crime, which is clearly admissible under Mil. R. Evid. 803(2). Assume further that between the time the abuse is discovered and the time of trial, the victim changes his or her testimony for no apparent reason. Finally, assume that the accused has confessed to the sexual abuse, but no other evidence (except the victim's first statement) corroborates the confession. Under these facts, trial counsel may elect to present the government's case solely on the basis of the accused's confession and the victim's first statement. These two statements are admissible as interlocking hearsay statements. Under *Inadi*, *Hines*, and *Quick*, it appears that such a tactic would be entirely proper.

### Conclusion

The opinions in *Hines*, *Dunlap*, and *Arnold* grant evidence proffered under Mil. R. Evid. 801(1)-(23) an automatic exemption from the *Roberts* unavailability rule.<sup>46</sup> On the other hand, evidence offered under Mil. R. Evid. 803(24) (residual hearsay) must face a case by case analysis and is admissible only if the declarant is unavailable and the evidence is reliable.<sup>47</sup>

Trial counsel should be aware of the requirements for admission of hearsay under Mil. R. Evid. 803(1)-(24), and argue all applicable exceptions, especially when the declarant is available to testify. What may not be admissible under Mil. R. Evid. 803(1)-(23), may still be admissible under Mil. R. Evid. 803(24).<sup>48</sup>

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 725.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 727.

<sup>40</sup> *Id.* at 725-27.

<sup>41</sup> 24 M.J. at 49.

<sup>42</sup> 23 M.J. 125 (C.M.A. 1986).

<sup>43</sup> CM 446587 (C.M.A. 25 Sept. 1987).

<sup>44</sup> 25 M.J. 129 (C.M.A. 1987).

<sup>45</sup> 23 M.J. at 129 n.6.

<sup>46</sup> *Hines*, 23 M.J. at 128-29 n.6; *Dunlap*, slip. op. at 5; *Arnold*, slip. op. at 9.

<sup>47</sup> See *Hines*, 23 M.J. at 135-36.

<sup>48</sup> *Id.* at 724. But see *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986) (the court did not salvage evidence not admissible under Mil. R. Evid. 803(1)-(23), but possibly admissible under Mil. R. Evid. 803(24), where counsel did not ensure that the record contained "the determinations called for by" that rule). This also appears to be the case in a recent opinion by the Army court. See *United States v. Ansley*, 24 M.J. 926 (A.C.M.R. 1987). *Ansley* is factually similar to *Quick*. The Army Court's failure to discuss Mil. R. Evid. 803(24) in the *Ansley* opinion suggests that a proper record for that analysis was not developed at the trial level.



## The Child Sexual Abuse Case: Part I

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### Introduction

The tremendous increase in the number of reported cases of child sexual abuse<sup>1</sup> makes one wonder if our society has reached its zenith and begun its trip on the downhill road to ruin. Of course, like many such dire prognostications, it ignores all that is right with the world. The victimization of children, however, has generated much anxiety for parents, some of whom no longer assume that even the environs of daycare provide a safe haven for their offspring and see danger at every shopping mall. When mentioned in the same breath with the missing/abducted children issue, the risks are sometimes exaggerated and concerns may be misplaced. Most child sexual abuse is committed within the family or by friends of the family, not strangers.<sup>2</sup> Similarly, the majority of missing or abducted children are runaways or the product of custody battles.<sup>3</sup>

Because of the strong feelings these cases engender in everyone, including counsel, they require the utmost in professionalism.<sup>4</sup> The stakes are great and passions are inflamed. The family and individual psychodynamics are already and forever altered and will be altered further by the trial. And, if convicted, the sentencing alternatives and effects are at best unattractive and at worst ineffective.

This is a "how to" article intended to get all of us to relook at how we handle, sometimes perhaps mishandle, these cases. Improvements can be made without budgetary impact, while simultaneously costing the parties less emotionally, all without jeopardizing the interests of justice and the accused's fair trial rights. Improvements that result in less traumatization of the victim and the family will result in less reluctance to report these crimes.

Part I of this article will examine the roles of the attorneys involved in a child sexual abuse case. Part II will analyze some of the current evidentiary issues and methods for overcoming various problems of proof that are endemic to cases involving the sexual abuse of children.

### General Observations and Comments

The emphasis in this article is on the intrafamily child sexual abuse case because it is so common and because it is often difficult to prosecute, defend, and treat. Many of the issues, however, are shared by other types of child sexual abuse. Child sexual abuse is not confined to cases of male offender and female victim, although this appears to represent the most commonly reported occurrence. The pronouns used in this article will conform to this generality.

There has long been a tension in child abuse cases between the social/juvenile welfare authorities, who (along with the defense counsel) prefer to dispose of the case non-criminally, and the criminal justice system, which mostly wants to prosecute.<sup>5</sup> This is a manifestation of the dual and sometimes opposing concerns of rehabilitation and retribution seen in most cases.<sup>6</sup>

Sexual assault of a child is a crime.<sup>7</sup> When this offense is committed, it is important to the family's long term health, as well as society's, to label the conduct as criminal, assign guilt, and impose punishment.<sup>8</sup> The child usually wants the abuse, but not the family relationship, to stop. Sexual offenders need therapeutic treatment, but treatment alone may not be sufficient incentive to overcome the strong impulses inherent in sex offenders. Therefore, punishment may also be indicated.<sup>9</sup> Incarceration without treatment, however, is also likely to be ineffective for rehabilitation. At some point, the time will have been served and the offender

<sup>1</sup> In 1983, it was estimated that 72,000 children were reported as sexually abused by a parent or other person living in the home. National Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services. *National Study on Child Neglect and Abuse Reporting* (1984). Unfortunately, precise national crime statistics are not available because the FBI's Uniform Crime Reports do not tabulate sexual assaults by age of victim. Perhaps it is time for the FBI to revise its reports by adding a category for sexual assaults upon children.

<sup>2</sup> While victimization of children has received vast amounts of media attention recently, it is not a "newly discovered" phenomena, according to David Finkelhor, Ph.D., who traces in his book, *Sexually Victimized Children* (1979), outbreaks of "public hysteria" and reform efforts as far back as 1937!

<sup>3</sup> See generally R. Townley, *Safe and Sound: A Parent's Guide to Child Protection* (1985), an excellent, well-balanced treatment of its topic.

<sup>4</sup> There is a popular belief that "children don't lie" about such a serious matter as sexual abuse. While a precocious awareness of sexual matters and an ability to describe sexual activities in graphic detail are indicators of a sexually abused child, every case should still be approached with a healthy dose of skepticism. Where the legal profession (and law enforcement) have historically looked upon psychiatry and psychology in the courtroom with a jaundiced eye when it comes to basic issues as *mens rea*, these mental health professionals are now viewed as allies in the battle trenches of sexual abuse. Children do lie, sometimes, and the most frequent occurrence is found where there is marital discord and the child is the focus of a custody dispute. What may appear to be sexual precocity might only be the product of parental pressures. Charges arising in this context should be examined very closely. See Coleman, *Has a Child Been Molested?*, Cal. Law., July 1986, at 15 (author is a psychiatrist).

<sup>5</sup> P. Mayhall & K. Norgard, *Child Abuse and Neglect* 211-26 (1983).

<sup>6</sup> Cf. Bulkley, *Legal Intervention and Reform in Child Sexual Abuse Cases*, in *The Educator's Guide to Preventing Child Sexual Abuse* (M. Nelson ed. 1986).

<sup>7</sup> The Manual for Courts-Martial, United States, 1984, Part IV, para. 54b(3)(c), provides enhanced sentencing for an assault, in violation of Article 128 of the Uniform Code of Military Justice, 10 U.S.C. § 928 (1982), committed on a person under 16 [hereinafter MCM, 1984, and UCMJ, respectively]. Also, MCM, 1984, Part IV, para. 87 proscribes, as a violation of Article 134, indecent acts upon or with a person under 16.

<sup>8</sup> Cf. A. Mayer, *Sexual Abuse: Causes, Consequences and Treatment of Incestuous and Pedophilic Acts* 68 (1985).

<sup>9</sup> *Id.* at 69.

will either go back home or put himself into a similar environment. Likewise, treatment, without some punishment served and some suspended, is probably ineffective, because there is little incentive to either stay in treatment or not repeat the behavior with the same or another child.<sup>10</sup>

### *Counsel as Officers of the Court*

As officers of the court, both the prosecutor and the defense counsel have an ethical obligation to uphold the integrity and the honor of the legal profession and conduct themselves so as to reflect credit upon it.<sup>11</sup> All counsel owe a solemn duty to inspire the confidence, respect, and trust of the public, as well as each counsel's client.<sup>12</sup> The lawyer's highest obligation, whether as prosecutor or as defense counsel, is to the administration of justice.<sup>13</sup>

### **Defense Counsel**

This paramount obligation may seem to be heresy to those who erroneously view the defense function as primarily directed toward the "avoidance of justice."<sup>14</sup> Others may think that this violates the accused's constitutional right to the effective assistance of counsel or poses an irreconcilable conflict for counsel. This is not so. While the defense counsel is obligated to represent the client "with zeal,"<sup>15</sup> this duty and the correlative right of the accused extends only so far as the representation is within the bounds of law. This "law" is not limited to criminal statutes, but also includes the rules of professional conduct which every organized bar has adopted in one form or another and by which its members, including judge advocates, are governed and subject to sanction for their violation.<sup>16</sup> A former Canon of Professional Ethics explained the importance of staying within the law:

Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties, than does the false [assertion] that

it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.<sup>17</sup>

### *Points for Defense Counsel to Ponder*

1. Be civil. In no case is there more to lose by failing to display courtesy and respect to everyone involved, including the complainant and other family members. This is especially true with respect to child protective and law enforcement authorities, even though they may be overbearing and self-righteous. Sometimes, their dread of an acquittal<sup>18</sup> causes them to hesitate in cooperation. When you add to that a climate of animosity, the bureaucrat's reluctance is crystallized into gleeful intransigence.

2. Investigate thoroughly. Bear in mind, and tell the accused, that it is an increasingly popular belief that "kids don't lie about such things." To the extent you can, verify what your client tells you. The guilty accused, if only through sheer humiliation and embarrassment, will hold out longer in these cases from telling his counsel the truth when it means admitting culpability. Provide the results of your efforts to the accused at regular intervals and keep him informed. You are probably, and should be, his primary source of information, even about his own family.

3. Assess the case realistically. As with every case, counsel must have some understanding of the client's short and long range goals. Ensure that he understands the risks and consequences of each prospective course of action so that he may assess whether his goals are made more or less likely by each choice. For example, an accused who only cares about avoiding conviction and has no hope or desire of restoring the family relationship might sooner contest the charges than would one whose primary goal is to reunite as a family. In the latter case, attacking the credibility of the truthful child will more than likely compound the child's psychological harm and make extremely difficult, if not impossible, rehabilitation of the offender and the family,

<sup>10</sup> P. Mayhall & K. Norgard, *supra* note 5, at 225-26.

<sup>11</sup> Army Rules of Professional Conduct Preamble (1987).

<sup>12</sup> *Id.*

<sup>13</sup> See generally ABA Standards Relating to the Prosecution Function and the Defense Function [hereinafter Prosecution Standard and Defense Standard, respectively], and Commentaries following Prosecution Standard 1.1 and Defense Standard 1.1, which provides: "[T]he concept of the lawyer as an officer of the court has sometimes been misread to imply limitations inconsistent with his obligations to his client. The lawyer's highest obligation, like that of every citizen, is to the administration of justice, whether as prosecutor or as defense counsel." *Id.* at 172. "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interest may seem to require a contrary course." *In re Integration of Nebraska State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937); accord *Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966) (Burger, J., concurring).

<sup>14</sup> Major General Kenneth J. Hodson (USA, Ret.), drolly presented an address entitled "The Defense Counsel's Role in the Avoidance of Justice," to the 25th JAG Advanced Course at The Judge Advocate General's School, Charlottesville, Virginia, in the spring of 1977. General Hodson was The Judge Advocate General of the Army from July 1, 1967 through June 30, 1971, when he retired from active duty, but was immediately recalled to serve as Chief Judge of the Army Court of Military Review. He was the first general officer Chief Judge and so served until March of 1974.

<sup>15</sup> Army Rules of Professional Conduct Rule 1.3 comment (1987).

<sup>16</sup> Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para 5-8 (1 July 1984) [hereinafter AR 27-10], adopts and makes applicable to Army judges the ABA Code of Judicial Conduct. Army lawyers are subject to the Army Rules of Professional Conduct. See 52 Fed. Reg. 23,883 (1987).

<sup>17</sup> ABA Canons of Professional Ethics Number 15 (1968).

<sup>18</sup> In addition to the natural uneasiness in seeing a perceived guilty person escape punishment, acquittal of a perpetrator increases the child victim's psychological harm and exacerbates the feeling of the child's powerlessness, hopelessness, and guilt feelings inherent in the child sexual abuse case. M. Nelson, Preventing Child Sexual Abuse 57 (1986).

regardless of the verdict. As usual, rehabilitation efforts depend for their success upon an admission of responsibility.<sup>19</sup>

4. Negotiate when appropriate. If you have investigated thoroughly and concluded that, based on all the evidence and the controlling law, a conviction is probable, so inform the accused. Normally, the accused's consent to engage in plea discussions should be obtained in advance, but sometimes a discussion may ensue, even if only of a very tentative or preliminary nature, before consent has been expressed.<sup>20</sup> While no confidence of the client may be disclosed to the prosecutor without the accused's consent, the defense counsel also must not misrepresent any fact in the case.<sup>21</sup> The opportunity for the informal discovery of the strength or weakness of the prosecution's case may offset any disclosure you might make, especially because no statements made during plea discussions are admissible against the accused at his trial.<sup>22</sup>

5. Negotiate early. In these cases, early disposition—even prior to the Article 32(b) investigation<sup>23</sup> should be seriously considered. Where the evidence of guilt is patent or the accused has already confessed three times and there is no obvious benefit to delaying the inevitable, negotiate early. More concessions regarding offenses and sentence limitation can usually be achieved before the prosecution has invested too much time or fully prepared its case. Afterwards, the prosecutor's only incentive to deal a case (that he or she may actually be excited about prosecuting) may be out of a concern to minimize the child's further traumatization. Such concern may not be controlling.

6. Negotiate what is important. The defense wins the battle but loses the war when it focuses on offenses rather than a realistic sentence limitation. Where the accused has admitted guilt and intends to plead guilty, the most important factor remaining is the sentence limitation. When tempted to negotiate a plea to a lesser offense rather than emphasizing the sentence limitation, defense counsel should consider which will be more important in the final analysis. In my opinion, the defense focus should be upon attaining a sentence limitation that is at or below a sentence the accused is willing to accept.

7. Trial on the merits. In a contested case, formulate a coherent theory of defense, supported by evidence you can

adduce, and ride it out. Stick with it from voir dire, through opening statement and case in chief, to closing argument. If the issue is lack of credibility in the complainant, so be it. Present it with all the zeal you can muster and the law will allow. Keep in mind that no other case has the potential to backfire as quickly as when you are perceived to be hostile to any child witness, no matter how big a liar the kid may be. The child automatically evokes sympathy, whether it be from the member's conclusion that she was abused, or only because she is so psychologically impaired as to lie about such a matter. Taking unfair advantage of a child witness can come in many forms, not the least of which is asking questions in anything but the simplest of words. Every word must be spoken with patience and ample time allowed for a response. Counsel's own display of child-witness abuse will be noted by the members, who will remember who you represent.

### Prosecution

The prosecutor must adopt and convey from the beginning the attitude of one who is only seeking "the truth" concerning the allegations. The prosecutor's primary function is not "to convict," but instead to establish the true facts to ensure that justice is done.<sup>24</sup> Prosecutorial zeal is often counterproductive in these cases and tends to turn off all but perhaps the criminal investigator, who already has enough zeal and may even need reining in.

### Points for the Prosecutor to Ponder

1. Seize the high ground quickly. For several reasons, the prosecutor must be informed and involved in the case as soon as the allegation surfaces. Such early participation enables the prosecutor to establish a climate of dispassionate objectivity, balance, and professionalism. The prosecutor should encourage and participate in a joint first interview of the child, including the child welfare officials and the criminal investigator, to reduce the trauma of having to repeat the story more than once.<sup>25</sup> The prosecutor can control the method of interview to enhance its admissibility at trial, including the proper use of video tape resources. A victim/witness advocate can be designated immediately to foster

<sup>19</sup> The first step toward rehabilitation may be manifested by the accused's admission of wrongdoing pursuant to a guilty plea and the court members are so instructed by the judge. See Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook para. (1 May 1982) [hereinafter Benchbook]. Beyond the trial arena itself, the acceptance of responsibility for the incest is key to the child's psychological recovery as well. When the adult offender admits responsibility, it not only helps the adult gain admittance to certain treatment programs, but it also takes the blame off the shoulders of the child. The child may otherwise be unable to avoid the nagging feelings of guilt, which are all too often readily heaped upon the child by other family members. These unrelieved guilt feelings are the source of much of the devastating effects of the sexual abuse upon the child. See generally A. Mayer, *supra* note 8.

<sup>20</sup> Defense Standard with commentary, *supra* note 13, section 4-6.1.

<sup>21</sup> *Id.*, section 4-6.2(b).

<sup>22</sup> Mil. R. Evid. 410.

<sup>23</sup> Article 32(a), UCMJ, provides the military accused with what has been described as the functional equivalent of a civilian grand jury, except that he has much greater discovery rights as well as the right to present evidence and to be present at all sessions, represented by counsel. Unless waived by the accused, no charge may be referred to trial by general court-martial unless an Article 32 investigation has been completed.

<sup>24</sup> Army Rules of Professional Conduct Rule 3.8 (1987).

<sup>25</sup> The most often-cited negative from the perspective of the child victim in prosecuting child sex abuse cases is subjecting the child to repeated questionings, as well as the additional emotional stresses and tensions from having to "relive" the experience so many times. M. Nelson, Preventing Child Sexual Abuse 58 (1986).

rapport and act as a friendly, supportive link between the child and "the system."<sup>26</sup>

**2. Every player has a part.** Recognize that there are competing interests in these cases. The police and the prosecutor are generally focused upon criminal prosecution. The child psychologist/psychiatrist is focusing on medical and mental diagnosis/treatment of the victim. Child welfare officials are trying to determine what is in the "best interests" of the child, but sometimes confusing the issue by placing too much emphasis on "preserving the family" as a paramount concern. The non-abusing parent is often the one most confused by the allegation. She may be the only one in the family who really does not know who did what or whom to believe. She will be extremely concerned and anxious about the family, the accused, and the child (and, in my experience, often in that order). Her emotions may be compounded by feelings of guilt for intentionally ignoring the abuse or failing to detect the abuse despite apparent indicators. More often than not she would be just as happy if "the authorities" would "just go away" and "let us work it out." This not uncommon view has been expressed more than once in my courtroom. It reflects a complex combination of factors, including family embarrassment, guilt, and economic concerns, which are hinged upon the accused being the family breadwinner. The nonabusing spouse may rationalize a willingness to forgive, if not condone, the offense. For example, the wife may express the view that "he really is a loving family man who's good to us and, besides, the kid wasn't really hurt." Frequently, the child will be

blamed for either the offense or for reporting it. The pressure upon the child to recant starts here.<sup>27</sup>

Each player's interests can be addressed without sacrificing the legitimate goals of another. It is in this vein that many jurisdictions have adopted protocols for handling these cases to coordinate the efforts of every interested party to prevent unnecessary trauma on the child by the "system" and streamline the case management from initial report to final disposition.<sup>28</sup>

Find out what policy, protocols, or compact exists. If none, learn what others have done and do something to ensure your jurisdiction is part of the group working toward solving child abuse problems, instead of contributing to the problems. While the real impact of *Solorio* remains to be seen, it is a near certainty that the off-post investigative activity of the Criminal Investigation Division will increase and that the military justice system will be busier.

**3. ALWAYS seek corroboration.** Complete recantation by the child and disavowal of an accused's confession, no matter how complete, is not unusual.<sup>29</sup> Prepare for it by investigative completeness as if the confession, if any, did not exist. Corroboration by physical evidence and scientific testing is critical. Secure the bed clothes, pajamas, and underwear of everyone if the last abuse was recent. Assume the source of semen will be at issue, despite a full confession. Consider having the entire family blood-typed. If blood typing consent is not freely given, get a warrant to authorize pricking of their fingers.

<sup>26</sup> AR 27-10, chapter 18, implements the Victim and Witness Protection Act of 1982 (Pub. L. No. 97-291). Paragraph 18-2, Policy, says it clearly:

a. The military justice system is designed to ensure good order and discipline within the Army and also to protect . . . lives and property . . . consistent with the fundamental rights of the accused. Without the cooperation of victims and witnesses, the system would cease to function effectively. Accordingly, all persons working within and in support of the system; i.e., commanders, judge advocates, and law enforcement and investigative agencies, must ensure that victims and witnesses receive due consideration, are extended authorized assistance, are treated with dignity and courtesy, and are subjected to minimum interference with personal privacy and property rights.

b. In those cases in which a victim has been subjected to attempted or actual violence, every reasonable effort should be made to minimize further traumatization. Utmost care and compassion will be accorded these victims, especially where a victim is a child or has been sexually assaulted. . . .

<sup>27</sup> See generally A. Mayer, *Supra* note 8. See also E. Ward, *Father-Daughter Rape* (1985), in which the author also points out the myth of the daughter as seductress or temptress is just that, a myth. The median age of daughters raped by their father is about 10 years of age. This means, of course, that as many are younger as are older than that median. *Id.* at 140.

<sup>28</sup> The Department of Children and Family Services of Chatham County, Georgia, participated with other agencies in forming the Child Sexual Abuse Task Force, which was chaired by a psychologist, Dr Deborah Kearney. The Task Force produced a protocol to manage and coordinate intrafamily child sexual abuse cases. Every interested agency participated and signed the protocol (which resembled a Memorandum of Understanding and has the same effect). The agencies included the child welfare authority, the public school system, local hospitals, the rape crisis center, the several police agencies within the county, the district attorney, and the judges of the juvenile court and superior court. The signing of the protocol was conducted in a ceremony, with ample media coverage. *Savannah Morning News*, Sept. 27, 1986, at 2C, col. 5. The protocol emphasized the cooperative nature of the new policy that requires, inter alia, the child welfare agency and the police to respond jointly when a report of alleged abuse within the family is first received by either agency. It also formalizes procedures for initial interviews to be conducted at a prescribed location, at which videotape resources are always on hand.

In view of the recent decision of the United States Supreme Court in *Solorio v. United States*, 107 S. Ct. 2924 (1987) (which overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969) that limited court-martial jurisdiction to offenses having some "service-connection") the need for close working relationships between civilian and military investigative, social service, and prosecutorial offices is of immense and immediate importance.

<sup>29</sup> Recantation of a true complaint is now regarded as a manifestation of a coping or accommodation technique in sexually abused children. It often follows graduated, sometimes inconsistent, disclosures. This pattern of sequential responses to child sexual abuse, termed the Child Sexual Abuse Accommodation Syndrome, are:

1. Secrecy
2. Helplessness
3. Entrapment and accommodation
4. Delayed, conflicted, and unconvincing disclosure
5. Retraction

R. Summit, 7 *Child Abuse and Neglect* 177, 181 (1983). The piecemeal, "little bit at a time," nature of the disclosures in category 4, as well as recantation, have long been construed as factors impeaching the credibility of the child witness. Now, however, the generally recognized Child Abuse Syndrome has reversed the situation and the presence of these factors is often perceived as enhancing the credibility of the witness. See e.g., *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984), which held admissible the opinions of expert witnesses who testified concerning the behavior patterns of sexually abused children, which pattern often includes recantation. *Snipes* is also a good example of an accused who admitted in pretrial statements performing all the alleged acts, but at trial proffered exculpatory explanations. Of course, every accused, guilty or not, has the legal and moral right to plead not guilty and to put the government to its burden of proof beyond a reasonable doubt. There are moral issues raised in an accused portraying a truthful child witness as a liar, however, when such is known not to be the case. Likewise, there are ethical implications in counsel participating in perpetrating what may be a fraud upon the tribunal. Army Rules of Professional Conduct Rule 3.3 (1987).

4. Do not hide/hog the ball. While you must be careful not to make any disclosure that would jeopardize the ongoing investigative activity, including corroboration, do not wait too long to use what you have to encourage early pretrial agreement negotiations. As soon as practicable, show the defense counsel the child's video tape. Let the other parent see it, too, so that "the facts are out and known." This may avoid the child being asked to explain to the other parent "what really happened?" during which the child may be subtly pressured to downplay the seriousness of the offense and thereby set up a fallacious basis for later impeachment.

5. Expedite the case, vigorously opposing delay. Delay in these cases is harmful to your case and the child victim. The child's life and family is disrupted and cannot begin to settle down until the trial is over. Do not cause delay or acquiesce unless absolutely necessary. Entertain early negotiation.

6. Negotiate with the emphasis on offenses, not sentencing. The criminal conduct must be accurately identified and labeled. If that is done, sentencing will almost take care of itself. This is not to say that the sentence limitation is unimportant. The prosecutor should be willing to support an agreement for the minimum sentence deemed appropriate for the offenses and the offender, however, general deterrence value, if any, is obtained from the sentence adjudged and announced publicly, as opposed to what the convening authority is limited to approving,<sup>30</sup> which is not often publicized. Specific deterrence of the accused is best obtained by suspension of confinement in excess of a certain amount, rather than disapproval of the excess.<sup>31</sup> Generally, the victim and family readjustment is aided by the accused's immediate, but not necessarily long term, removal from the home.<sup>32</sup> The family needs a chance to "regroup" and get started on the usually lengthy road of psychotherapy. While "some jail time is a necessary expiatory factor in the successful treatment or rehabilitation of some sexual offenders."<sup>33</sup> I have heard it argued that confinement, representing another family separation, is more punishment for the family than the offender. Short-tour and temporary duty family separations are a fact of life for the military family, however, and most are prepared to face separations when necessary.

7. Trial on the merits. Put on only a prima facie case. Trying to anticipate the defense may convey weakness more than anything else. Besides that, it is inefficient. The theory

of primacy and recency says the jury will recall more of what is presented first and last, little in the middle. Rebuttal is more effective if done with the accuracy of a rifle, instead of lumped in the middle where it has all the force and effect of shooting at a galloping bull moose with scattershot.

8. Prepare for recantation. Know what rules of evidence will allow the admissibility of the victim's and accused's incriminating pretrial statements. The foundation requirements are obviously different depending on whether the statements are hearsay at all, and if so, whether the declarant is available and whether the declarant is disavowing the abuse in toto, or only selectively "can't remember." Specific examples will be discussed in Part II of this article.

9. Prepare for resistance to subpoenas. Often the family will have left the area to go "back home." In such case, there is a great temptation to disappear or to avoid service of process. Do not rely upon early expressions of cooperation. No matter how sincerely made, the closer trial gets, the less incentive there is to either face the ordeal of trial or to cement the conviction. Use formal service of process, effected by a U.S. Marshal when practicable.<sup>34</sup> Witnesses are less likely to noncomply with such service. If they do, their refusal is likely to result in timely issuance and execution of a warrant of attachment.<sup>35</sup> If the record shows that the victim either refuses to testify against the accused or is willing only to testify in his favor, the issue will be squarely presented as to whether the accused used coercion, control, or influence to avoid conviction, which may be a waiver of the accused's right to confront the "unavailable" witness.<sup>36</sup> Usually, the other parent should be subpoenaed as well, both as a witness and to accompany the child. In the event of a warrant of attachment, however, the parent may be more hindrance than help and might not be needed as an escort because the U.S. Marshal will have the child in custody. If informed of this possibility, the parent may view it as incentive for attendance the easy way, both parent and child at government expense, as opposed to the hard way, with potentially only the child's travel at government expense. The practicality of this latter course of action needs careful review before it is implemented. The marshal will hardly be a willing twenty-four hour "baby sitter," but someone will have to assume this responsibility.

10. Present all you should during sentencing. If the stipulation of fact required by a pretrial agreement only reiterates the elements, the court needs more. Trial counsel

<sup>30</sup> In military practice, the court members are not informed as to any sentence limitation or even that there is a pretrial agreement. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 705(e) [hereinafter R.C.M.]. The judge must be informed of the pretrial agreement itself during the providence inquiry, R.C.M. 910(f)(2), but in a judge alone trial, the judge is not informed of the specific sentence limitation until after a sentence is determined. R.C.M. 910(f)(3).

<sup>31</sup> P. Mayhall & K. Norgard, *supra* note 5, at 225-26. Power to approve, disapprove, and suspend any portion of a sentence is lodged in the convening authority, R.C.M. 1107(d)(1), 1108(b); UCMJ art. 60. While the court may recommend suspension, it has no power to order it and is so instructed by the judge. For example: "While you may recommend suspension or other clemency action, such recommendation is in no way binding. You must adjudge a sentence that you would be satisfied with seeing actually carried out, without reliance on possible mitigating action by the convening or higher authority."

<sup>32</sup> Cf., A. Mayer, *supra* note 8, at 68-69.

<sup>33</sup> M. Nelson, *supra* note 18, at 59.

<sup>34</sup> See R.C.M. 703; AR 27-10, para. 5-20. The subpoena is Dep't of Defense Form No. 453, Subpoena of Civilian Witness (Aug. 1984) and requires the tendering of travel orders (Dep't of Defense, Form No. 453-1, Travel Orders (Aug. 1984)) and fees at the time of service. An example is in MCM, 1984, app. 7.

<sup>35</sup> See R.C.M. 703(e)(2)(G), for the requirements for issuance of a warrant of attachment to compel and obtain the appearance of the witness. A Dep't of Defense, Form No. 454, Warrant of Attachment (Oct. 1984) is used by the judge to issue the warrant of attachment. Do not wait until you need these forms to get them on hand! Note the difference between it and a criminal complaint under UCMJ art. 47, which has as its goal the punishment of those who fail to comply and thereby vindicate the military's right to compel attendance.

<sup>36</sup> See *United States v. Barror*, 23 M.J. 370, 373 (C.M.A. 1987); *United States v. Hines*, 23 M.J. 125, 131 (C.M.A. 1986).



should seek to introduce relevant victim impact evidence under R.C.M. 1001(b)(4). Counsel should inform the court regarding the child victim's diagnosis, prognosis, and psychological assessment.

Also, the trial counsel may wish to introduce opinion evidence of the accused's rehabilitative potential. This may include whether he is a "regressed offender,"<sup>37</sup> for whom effective treatment is quite possible, or a "fixated" pedophile,<sup>38</sup> who may have little hope of overcoming his sexual preferences.

### The Judge

If the judge were only a "mere referee,"<sup>39</sup> his role in these cases would be like any other. The judge's role, however, includes ensuring that the rights of all parties are protected, including the accused, but also extending to the victim. Therefore, the judge should exercise greater control over and more flexibility with the usual procedures to ensure the ascertainment of truth and justice.

### Points for the Judge to Ponder

1. Docket for speedy trial. The judge should give priority to these cases and ensure the parties know the case will be

docketed for early trial and a continuance granted only for "reasonable cause."<sup>40</sup> Remember that R.C.M. 906(b)(1) applies to both parties and that anything beyond the five days provided by Article 35,<sup>41</sup> is within the sound discretion of the judge.

2. Grant justified continuances. Review the local rules of court to ensure they establish standards for granting and denying requests for continuance. It is a rare case that cannot be ready for motions within two weeks and trial on the merits within four weeks of referral. Trial counsel's and defense counsel's time and workload are management responsibilities of their respective superiors. Therefore, counsel's other case load should not be the controlling factor, except as to avoid a conflict with a previously scheduled appearance in another court.

3. Ethics and delay. Counsel sometimes lose sight of the ethical proscription to accept no more employment than can be reasonably performed<sup>42</sup> within both the spirit of the right to a speedy trial and the effective assistance of counsel. Civilian counsel sometimes view nonpayment of counsel fees as justification for nonperformance by counsel, instead

<sup>37</sup> A regressed sexualophile is one whose sexual orientation has become focused on a (usually) specific child, as opposed to children in general. The regressed offender may have a history of otherwise apparently normal adult heterosexual relationships. One theory is that the deviancy may be caused by great stress in the offender's life, which causes him to regress to an early stage of sexual development that he may associate in his mind with children. Frequently, he is experiencing a loss of self-esteem, insecurity, and a lack of self-confidence in regard to a current adult relationship. A. Mayer, *supra* note 8, at 22. See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, §§ 302.20, 309.30 (3d ed. 1980) [hereinafter *DSM III*]. The motivations for child sexual abuse are many and varied. For some it is sexual gratification, but for others it has nothing to do with sex. Instead (like many rapists) it may be simply an act of violence or aggression to establish power or control over one who is weaker. D. Finkelhor, *supra* note 2, at 22. Often, the sexual abuse arises in homes with marital discord as a precursor. The unstable lifestyle of nomadic fathers (e.g., military members) has also been seen as a contributing factor to incest, which is often seen occurring upon return from an absence. *Id.* at 27. When there is difficulty in his adult relationship, the transition to obtaining sexual gratification or comfort from the child is eased because, compared to the child, the offender is able to exercise control, regain his lost self-confidence, and vanquish the vulnerable one who trusts him. This new, adult role for the child requires the child to respond in an adult (and sexual) manner, which often causes the child's own stressful response, frequently manifested by a decline in school performance, truancy, aggressive or seductive behavior, inability to get along with peers, defiance against "childish rules" of the family, lying, stealing, and promiscuity—the "Child Abuse Syndrome". See generally P. Mayhall & K. Norgard, *supra* note 5, at 180. This promiscuity may trigger the imposition of even stricter family rules, sometimes with an ulterior motive of jealousy in the offender. *Id.* at 181, 201.

In theory, the regressed offender can be treated by solving the underlying stressors, improving his interpersonal skills, and educating him on the psychic harm that his behavior causes the child. Cf. A. Mayer, *supra* note 22. He will also have to be convinced that any belief he may have that the child "enjoyed it" (i.e., was also to blame) is only a feeble attempt to rationalize his wrong that makes him otherwise feel guilty. See E. Ward, *supra* note 27.

<sup>38</sup> A "fixated" pedophile is one whose basic sexual attraction is to children. *DSM III*, *supra* note 36, § 302.20. For this offender, stress is not the "cause" of the sexual offense, but more often is the effect and the result of conduct that he knows is socially repugnant, but that he is unable to resist. Rather than his behavior being the product of regression, the pedophile is generally believed to have had his sexual development arrested at some point in adolescence, often at the same age level when the offender was himself the victim of sexual abuse. A. Mayer, *supra* note 8 at 23. This urge often rises to the level of a fixed, habitual compulsion comparable to that of alcoholics for "just one drink." *Id.* The pedophile has a tremendous range of rationalizations for his conduct, including "she wanted me to do it," "she enjoyed the sex, not just the extra attention," and "it was O.K. because she didn't know it wasn't O.K." His attempts to rationalize or minimize his conduct are simply forms of denial, a classic characteristic of all sexual offenders. A closely related characteristic to denial is this offender's common inability to experience guilt feelings or remorse, which may be the result of his feeling that his conduct really has not had a deleterious impact on the child. Even if he can recognize the harm, he may be incapable of caring because this offender often lacks a social conscience. As a result, people become mere objects to be manipulated for their own pleasure. *Id.* The pedophile often volunteers for activities that will provide access to children and is more likely to molest children outside his own family.

This offender may be extremely difficult to rehabilitate. Treatment would consist of redirecting or controlling his basic sexual orientation or preference, which may not be possible. Rehabilitation might consist of training him to refrain from acting on his urges and avoiding situations that foster temptation. As in criminal misconduct in general, successful rehabilitation is measured in simply a lack of recidivism, which unfortunately is very high in pedophiles. A. Mayer, *supra* note 22.

CAVEAT: Rarely is life as neatly compartmented as the discrete categories of the experts or *DSM III* might imply. An offender may have a combination of disorders.

<sup>39</sup> In *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975), the Court of Military Appeals emphatically announced an enlarged view of the role of the military trial judge:

What we do reject is the notion that the legality of a criminal trial may be measured by the same standards applicable to a game of chance. The trial judge is more than a mere referee, and as such, he is required to assure that the accused receives a fair trial.

<sup>40</sup> R.C.M. 906(b)(1) discussion.

<sup>41</sup> UCMJ art. 35 provides:

The trial counsel . . . shall cause to be served upon the accused a copy of the charges. . . . In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge . . . in a general court-martial case within a period of five days after the service of charges upon him.

<sup>42</sup> Army Rules of Professional Conduct Rule 1.3 comment (1987).

of only providing a basis to request to withdraw, which is within the sound discretion of the judge.<sup>43</sup>

4. Consider how the normal courtroom layout and procedure can be changed to make it less intimidating for the young witness. Encourage the trial counsel to familiarize the child with the courtroom, but take it a step further than the usual tour of the empty building. Before the child is called in to testify, suggest the trial counsel have the child observe an appropriate part of some trial proceedings to see the room full and how it operates. This can be done without running afoul of Mil. R. Evid. 615, which provides for the sequestration of witnesses, if the observed portion is unrelated to the testimony of the child and would not therefore alter or shape the child's testimony.

Consider the courtroom placement of counsel tables. Where does the accused sit in relation to the bar's entry point and the witness stand? There is no requirement that the child witness squarely face the accused. Some suggest using a child-size chair. If a child is that small, however, and if a special showing is made, consider instead allowing the child to sit on a supportive adult's lap in the witness chair or for the child to simply stand.

Competency of the child as a witness is now presumed. Under Military Rule of Evidence 601, it is not necessary for the child to be able to distinguish truth from falsehood or even understand the moral importance of telling the truth. Such matters go only to weight, not competency.<sup>44</sup> The oath to be used is a proper subject for an R.C.M. 802 conference, bearing in mind that the oath's form is not absolute.<sup>45</sup> It should be simply designed to convince the child that the court wants the truth and a commitment to provide it. The following should be sufficient:

Do you promise to tell us what happened? (Yes.)

You gonna tell us the truth—or a story? (Truth.)

Promise? (Yes.)

<sup>43</sup> The infamous "witness" Mr. Green's mere failure to appear (i.e., the money due is not paid), does not automatically equate to grounds for either a continuance or a perfected right to withdraw. Mr. Green is neither "relevant" nor "necessary" as defined in R.C.M. 703. Army Rules of Professional Conduct Rule 1.16(b)(4) (1987), however, provides that counsel may withdraw when a client "fails substantially to fulfill an obligation to the lawyer," if "reasonable warning" has been given regarding the matter. Despite such good cause to withdraw, however, counsel "shall continue representation" "[w]hen ordered to do so" by the court. *Id.* 1.16(c). The closer to trial the request to withdraw is made, the less likely the interests in the orderly administration of justice will be advanced by granting the withdrawal. Of course, discharge of the lawyer by the client is a separate issue, but if untimely and only due to a fee dispute it might not have to be permitted, or if permitted, result in a continuance. Obviously, great caution and wise discretion is required here! It is essential that the local rules of court address such matters so that civilian counsel are on notice when they accept employment in the first place.

<sup>44</sup> Military Rules of Evidence 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." According to the Analysis, this rule supersedes the previous requirements of Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 148, for the prospective witness, inter alia, to know the difference between truth and falsehood and to understand the moral importance of telling the truth in order to be qualified as a witness. Rule 601's reference to other rules includes those pertaining to oaths (603), the judge and members as witnesses (605, 606), and the rules as to privileges. It is possible, however, that the judge may have to balance the probative value of the testimony to determine if it is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the members" under Rule 403 if, for example, the child is severely mentally retarded or of very young age.

<sup>45</sup> Mil. R. Evid. 603 merely states: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." The discussion following R.C.M. 807 contains suggested forms of oaths routinely used.

<sup>46</sup> R.C.M. 806.

<sup>47</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>48</sup> 464 U.S. 501 (1984).

<sup>49</sup> 20 M.J. 433 (C.M.A. 1985).

<sup>50</sup> Judge Cox, writing for the majority, noted that *Press-Enterprise* had not yet been decided at the time the military trial judge ruled. *Id.* at 436 n.3.

An overly solicitous attitude toward the child should be avoided, as should an attitude of insensitivity. Kids are often tougher than we give them credit for. For many, the courtroom appearance may be less traumatic than what they have already been through. The focus should be on ensuring their testimony is received without distortion by the immediate circumstances. Unnecessary intervention by the judge in the presence of members may convey a lack of impartiality. The fair and orderly administration of justice demands that the judge act when signs of hesitation, discomfort, or real embarrassment in the child are observed, however. A recess is usually appropriate to determine the cause of the problem. Do not assume what the cause of the problem is. It may only be that the child needs to go to the bathroom.

The judge should also intervene when lines or forms of questioning intimidate or confuse the child. Unfortunately, it is true that some counsel absolutely cannot talk below the graduate level. Consider requiring such counsel to write out their questions and permit questions to be asked while seated at counsel table.

5. Closing the court. Generally, "courts-martial shall be open to the public."<sup>46</sup> Whether and to what extent the court can lawfully be closed to exclude the public in general, or to certain persons in particular, is an issue that goes to the heart of judging. In addition to the accused's sixth amendment right to a public trial, there is also an "implicit first amendment right of the press and public" to attend criminal trials.<sup>47</sup> Therefore, the Supreme Court in *Press-Enterprise Co. v. Superior Court*,<sup>48</sup> set out a stringent test that must first be met: the movant must advance an overriding interest that will otherwise be prejudiced; the closure must be narrowly tailored to protect that interest; the judge must consider reasonable alternatives to closure; and the judge must make specific findings to support closure.

The Court of Military Appeals in *United States v. Hershey*<sup>49</sup> held that the judge failed to meet this test.<sup>50</sup> When a judge closes a court, even if the apparent result is to only exclude the bailiff and the accused's escort, the

judge must make findings on the record, based upon evidence presented, to support the closure.<sup>51</sup> The judge may not rely upon the "mere assertions" of the trial counsel, even though apparently not factually disputed.<sup>52</sup> The judge should consider: the child's age, psychological maturity, and understanding; the nature of the crime; the witness' desires (not just the prosecutor's); and the interest of the parents and relatives.<sup>53</sup>

<sup>51</sup> *Id.* at 436.

<sup>52</sup> *Id.* at 436-37.

<sup>53</sup> *Id.* at 437 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982)).

## Conclusion

There are many ways to improve the administration of justice in child sex abuse cases. The child and family have been hurt enough without the justice system inflicting its own form of punishment upon them, without even the benefit of due process the offender gets. Each player has a role. If the players conduct themselves in a way that enhances the public's confidence in our justice system, justice will be provided to our youngest citizens, as well as to the accused.

## Clerk of Court Notes

### Processing Time: Deducting Post-Trial Defense Delay

In *The Army Lawyer*, Nov. 1985, at 46, we explained that defense-requested delays in the post-trial processing of a case can be deducted from the cumulative elapsed days shown on the Chronology Sheet (Inside Front Cover of DD Form 490 or 491).

The only delay that will be recognized automatically by the data enterer in the Clerk of Court's office is an extension of the ten-day period permitted by R.C.M. 1105(c)(1) and R.C.M. 1106(f)(5) granted at the express or implied request of counsel for the accused. The number of days' extension must be reflected by a negative number inserted before the final total in the "Cumulative Elapsed Days" column. This should be accompanied by an entry in the "Remarks" section such as the following: Defense delay, R.C.M. 1105(c): 6 days (31 Mar-5 Apr 87).

If there are other periods of delay caused by the defense that the staff judge advocate believes properly should be deducted from post-trial processing time, these should be explained in the "Remarks" section. Begin the explanation with the words "NOTE FOR THE CLERK OF COURT:" and be certain to specify dates of the various events as well as the reasons.

In connection with the Chronology Sheet, there are answers to two questions occasionally received: (1) Always use line 8 for cases being sent to the Clerk of Court. Line 9 is only for cases being reviewed by a local judge advocate. (2) The date to be entered on line 8 is the first day an *authenticated* record reaches the office of the staff judge advocate (usually received by the trial counsel) for preparation of the staff judge advocate's recommendation and the convening authority's action. It is not the date the convening authority receives the record with the recommended action for his or her signature.

### Military Justice Statistics, FY 1984-1986

Eight percent fewer nonjudicial punishments were imposed in the Army in FY 1986 than were imposed in FY

1985. Significantly, the nonjudicial punishment rate per thousand soldiers dropped from 154 to 143 per thousand. On the other hand, the number of trials by court-martial in FY 1986 declined less than one percent from FY 1985. These changes were revealed by compilation of FY 1986 data for comparison with the two preceding fiscal years, a process delayed by "breaking in" a new data base—the Army Court-Martial Management Information System (ACMIS)—which became operative in the fourth quarter of FY 1986.

As for types of courts-martial, bad-conduct discharge special courts-martial declined, but general courts-martial increased by nearly as many cases. The significant decline in lower special courts-martial continued, but was almost matched by an increase in summary courts-martial.

In the comparison tables below, the older Courts-Martial and Disciplinary Information Management System (CDIMS) data base remains the source of information about nonjudicial punishment and summary courts-martial. CDIMS also is the source for court-martial information through the third quarter of FY 1986. Information as to guilty plea cases (defined as a case uncontested even if the accused pleaded not guilty to one or more specifications) in general and special courts-martial comes from the Army Trial Judiciary. CDIMS evidently was programmed to report as guilty plea cases only those in which all pleas were guilty; not a useful definition when there are plea bargains.

Due to late detection of some JAG-2 report and input or programming errors, the numbers of trials and nonjudicial punishments shown in the tables below differ slightly from those shown in the Report of The Judge Advocate General of the Army included in the FY 1986 Annual Report of the Code Committee on Military Justice.



## Military Justice Statistics, FY 1984-1986

### General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1984	1,442	96%	88%	60%	69%	15%	41%	1.85
1985	1,420	96%	88%	67%	69%	17%	46%	1.81
1986	1,450	95%	92%	67%	69%	19%	39%	1.85

### Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv Rate	Disch Rate	Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1984	1,403	95%	70%	57%	77%	13%	37%	1.81
1985	1,304	95%	70%	63%	75%	14%	37%	1.66
1986	1,269	94%	71%	66%	79%	15%	34%	1.62

### Other Special Courts-Martial

FY	Cases	Conv Rate	Disch Rate	Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1984	461	87%	NA	43%	64%	24%	15%	0.59
1985	363	80%	NA	41%	62%	24%	14%	0.46
1986	282	82%	NA	47%	65%	25%	14%	0.36

### Summary Courts-Martial

FY	Cases	Conv Rate	Pleas	Drug Cases	Rate/ 1,000
1984	1,645	92%	43%	14%	2.09
1985	1,308	92%	40%	14%	1.66
1986	1,382	92%	42%	13%	1.76

### Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/ 1,000
1984	113,914	76%	24%	12%	144.7
1985	121,153	78%	22%	19%	154.0
1986	111,758	80%	20%	19%	142.7

## Regulatory Law Office Note

### The Defense Environmental Restoration Program

The Army has had its own Installation Restoration Program since 1975. Recently, however, in section 211 of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress established the Defense Environmental Restoration Program (DERP). The DERP is codified at 10 U.S.C.A. § 2701 (West Supp. 1987). Section 2701(a)(1) requires the Secretary of Defense to carry out a program of environmental restoration at facilities under the Secretary's jurisdiction to be known as the DERP. The goals of the DERP are:

(1) The identification, investigation, research and development, and clean-up of contamination from hazardous substances, pollutants, and contaminants.

(2) Correction of other environmental damage (such as detection and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to the public health or welfare or to the environment.

(3) Demolition and removal of unsafe buildings and structures of the Department of Defense at sites formerly used by or under the jurisdiction of the Secretary.

10 U.S.C. § 2701(b) (West Supp. 1987).

To enable the Secretary to carry out these goals, 10 U.S.C.A. § 2703 establishes the Defense Environmental Restoration Account (DERA). The DERA was funded at

\$136 million through fiscal year 1987. These funds may be transferred to other Department of Defense (DOD) accounts in order to carry out the DERP or environmental restoration under any other provision of law. 10 U.S.C.A. § 2703(c) (West Supp. 1987).

Response actions conducted under the DERP must be done in accordance with the requirements of the Comprehensive Environmental Compensation and Liability Act of 1980 (CERCLA), as amended by SARA, 42 §§ U.S.C.A. 9601-9675 (West 1983 and Supp. 1987). This is an important requirement because the SARA has added significant new requirements to the clean-up of released hazardous substances at DOD facilities.

Of particular importance is § 121(d) of SARA, 42 U.S.C.A. § 9621(d), which requires that remedial actions must attain a degree of clean-up that at a minimum assures protection of human health and the environment. It further defines the criteria by which one can determine how much of a particular hazardous substance, pollutant, or contaminant may remain onsite after clean-up is completed. Any standard, requirement, criteria or limitation under any Federal environmental law, or any more stringent, promulgated and identified state standard under a state environmental or facility siting law that is legally applicable to a particular hazardous substance, pollutant or contaminant that is to remain onsite must be met. Additionally, any Federal or promulgated and identified state standard, requirement, criteria or limitation that is not legally applicable to a particular hazardous substance that is to remain onsite, but which is relevant and appropriate under the circumstances of the release or threatened release, must also be met. The acronym ARAR is used to refer to applicable or relevant and appropriate requirements. This requirement to meet more stringent state ARARs is problematic because it may literally mean that the Army must comply with fifty different standards for the same hazardous substance, pollutant, or contaminant depending upon in which state a clean-up is being conducted.

Section 121(d)(4) of SARA establishes four narrow exceptions to the ARAR requirement. Section 121(f)(3), however, allows the affected state to sue the Federal agency involved and attempt to require the agency to meet the ARAR. To do so, the state must establish on the administrative record that the determination that a section 121(d)(4) exception is applicable is not supported by substantial evidence. Even if the state does not win on the merits, it can still require the ARAR to be met if the state agrees to pay the additional cost attributable to meeting the ARAR.

In addition to state ARARs, DOD must also comply with state laws concerning removal and remedial action, including state laws regarding enforcement, when conducting removals and remedial actions at DOD facilities unless those facilities are on the National Priorities List (NPL). The Regulatory Law Office is of the opinion that the only state laws which are applicable under this section are state mini-CERCLAs, which truly concern removal and remedial action, and not other state environmental laws.

Section 120(a)(2) of SARA makes it clear that DOD facilities can be on the NPL. The Environmental Protection Agency (EPA) recently added fourteen Army sites to the NPL, including sites at Forts Dix and Lewis and twelve Army Materiel Command installations. 52 Fed. Reg. 27,624 (1987). This is important not only for the application of state laws concerning removal and remedial action, but also because it is EPA and not DOD that has been delegated the response and related authority for DOD sites that are on the NPL. DOD has this delegation for non-NPL sites where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody or control of the DOD. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

Section 120(e) of SARA requires DOD and EPA to enter into an interagency agreement (IAG) for remedial action at each DOD site that is on the NPL. This agreement must provide for a review of the alternative remedial actions developed by DOD, with the selection of the appropriate remedial action made jointly by DOD and EPA. If DOD and EPA are unable to agree on the appropriate remedial action, then EPA makes the selection. The IAG must also include a schedule for the completion of the remedial action selected and arrangement for long-term operation and maintenance of the facility. The first such agreement was recently signed by the Army, EPA and the State of Minnesota for the clean-up of contamination at Twin Cities Army Ammunition Plant (TCAAP) in Minneapolis, Minnesota. Because there is some variation from the § 120(e) requirements, including having the state as a signatory, the TCAAP agreement is an agreement under § 120, rather than an IAG strictly under § 120(e).

So far, 4,000 Army sites have been identified for clean-up at 1,400 installations under the Installation Restoration Program (IRP). This total includes National Guard Bureau and Army Reserve installations. Sixty-five remedial actions have been completed and 162 are ongoing. All required remedial actions are currently planned to be initiated by fiscal year 1994.

The Chief of Engineers is the Army Staff proponent of the Army's IRP, while the Army Materiel Command (AMC) is responsible for its development and execution. AMC executes this responsibility through the U.S. Army Toxic and Hazardous Materials Agency (USATHAMA). These major players will continue with their current responsibilities while ensuring that the changes brought about by the SARA and the DERP are incorporated. Guidance on the new requirements will be incorporated into a new chapter of AR 200-1.

All judge advocates and legal advisors are not expected to become experts in this area. They should become aware of and be involved in environmental restoration activities at their installations, however, to help ensure that the requirements of CERCLA/SARA and the DERP are complied with. The Regulatory Law Office is available for advice and assistance. Additionally, counsel should review the current requirements of AR 200-1, chap. 8.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Note

### Partial Mental Responsibility—Time for Reassessment

Article 50a of the Uniform Code of Military Justice<sup>1</sup> made sweeping changes to the military's standard, and the procedures used, in determining the accused's sanity.<sup>2</sup> That standard, effective 14 November 1986, was incorporated in the Manual for Courts-Martial as Rule for Courts-Martial 916(k)(1).<sup>3</sup> Additionally, as part of the reform generated by Article 50a, the drafters of the Manual also reexamined the defense of partial mental responsibility. Because Article 50a specified that "[m]ental disease or defect does not otherwise constitute a defense" and the legislative history indicated that the insanity defense should not be resurrected under some other guise, the drafters eliminated the limited defense of partial mental responsibility.<sup>4</sup> Accordingly, although federal case law was split, R.C.M. 916(k)(2) was revised. The new standard provides: "A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."

The two primary federal decisions supporting this revision were *United States v. White*<sup>5</sup> and *United States v. Pohlot*.<sup>6</sup> On 25 August 1987, *Pohlot* was overruled.<sup>7</sup>

In *Pohlot*, the Court of Appeals for the Third Circuit ruled that the Insanity Defense Reform Act<sup>8</sup> did not bar the introduction of evidence of the accused's mental condition on the issue of specific intent to commit the crime charged. The prosecution argued, as R.C.M. 916(k)(2) states, that the Act precludes the use of mental abnormalities to negate mens rea, but the court disagreed. The court found that both the legislative history and the wording of the statute clearly indicated that Congress only meant to do

away with "affirmative defenses" and not evidence that tends to negate an element of a crime. Thus, inasmuch as psychiatric evidence that negates specific intent does not provide a complete defense, it is not barred by the statute. Additionally, the court noted that accepting the prosecutions' version of the Act would raise significant constitutional issues under *In re Winship*,<sup>9</sup> which holds the government to its burden of proving every element of a crime beyond a reasonable doubt. This reversal by the Third Circuit places the standard provided by R.C.M. 916(k)(2) in serious doubt.

The Third Circuit is not alone in its analysis of the Act. The Northern District of California and the District of Columbia District Courts, in *United States v. Frisbee*<sup>10</sup> and *United States v. Gold*,<sup>11</sup> respectively, have interpreted the Insanity Defense Reform Act to permit the use of evidence of the accused's mental condition, as it tends to negate a specific intent. Thus, at least three federal courts now permit the use of this type of evidence. Notably, the other decision cited by the Manual for Courts-Martial as the basis for R.C.M. 916(k)(2), *United States v. White*, contains no meaningful analysis of the issue.

The *Pohlot* decision clearly indicates that it is time for the government to reassess its position with respect to the admission of evidence of the accused's mental condition when it does not rise to the level of the complete insanity defense. Although the accused's mental condition may not meet the threshold of being a "severe" mental disease or defect, and the government has the "black letter" position of R.C.M. 916(k)(2) to prevent the use of the limited defense of partial mental responsibility, the better response at this juncture is to permit the defense to use any evidence of the accused's mental abnormality if relevant to a mens rea requirement.<sup>12</sup> Major Williams.

<sup>1</sup> Uniform Code of Military Justice art. 50a, 10 U.S.C.A. § 850a (West Supp. 1987) [hereinafter UCMJ].

<sup>2</sup> For a discussion of the changes to the insanity defense standard, see Williams, *Not Guilty—Only by Reason of Lack of Mental Responsibility*, The Army Lawyer, Jan. 1987, at 12.

<sup>3</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(1) [hereinafter R.C.M.].

<sup>4</sup> See R.C.M. 916(k) analysis.

<sup>5</sup> 766 F.2d 22 (1st Cir. 1985).

<sup>6</sup> No. Cr. 85-00354-01 (E.D. Pa. Mar. 31, 1986).

<sup>7</sup> 827 F.2d 889 (3d Cir. 1987).

<sup>8</sup> 18 U.S.C.A. § 20(a) (West Supp. 1987). Article 50a, UCMJ, is based on the Insanity Defense Reform Act.

<sup>9</sup> 397 U.S. 358 (1970).

<sup>10</sup> 623 F. Supp. 1217 (N.D. Cal. 1985).

<sup>11</sup> 661 F. Supp. 1127 (D.D.C. 1987).

<sup>12</sup> Both the Army's and Navy's judiciary have issued letters advising their judges to consider the admissibility of this evidence despite R.C.M. 916(k)(2).

## Legal Assistance Items

### The Chief of Staff's Award For Excellence in Legal Assistance

Major General Overholt has announced the 1987 competition for the Chief of Staff's Award For Excellence in Legal Assistance in a memorandum dated October 2, 1987. The memorandum is reproduced in this issue of *The Army Lawyer*, at 4.

In response to comments about last year's two competitive categories, this year there will be three size categories. Large offices are those with 15 or more attorneys, medium-sized offices are those with 3 to 14 attorneys, and small offices are those with 1 or 2 attorneys. Commands with branch offices can submit a consolidated entry, or the individual offices can enter the appropriate category based on their sizes.

Legal assistance attorneys are encouraged to discuss this matter with their CJA or SJA and the commander as appropriate. All legal assistance offices are strongly encouraged to enter the competition.

### Army Tax Assistance Program Message

The Chief of Staff recently sent a message to all commanders encouraging them to devote adequate resources to the Army Tax Assistance Program. The emphasis General Vuono places on this effort should help alert your local commanders to the importance of their participation in this preventive law and legal assistance service. A copy of the message, which has a date-time group of 081736Z Sep 87, is reproduced below.

From: HQDA (DACS-ZA), Wash DC  
Subject: Army Tax Assistance Program

1. Preparing tax returns is a difficult task for many of our soldiers and their families. This year it will be even more difficult because of the new tax laws and new forms. The Army Tax Assistance Program has, over the years, helped our soldiers complete their returns accurately and in a timely manner, assuring prompt refunds when due and avoiding the need to hire commercial tax preparers.

2. AR 600-14 requires installation commanders to establish a program to provide tax assistance to our soldiers. MG Hugh R. Overholt, The Judge Advocate General, has directed staff judge advocates Army-wide to become more deeply involved in ensuring that we meet the challenge imposed by the complexities of the new tax laws. The key to successful local tax programs is the coordination of all available tax assistance assets. Commanders at every level must ensure that Unit Tax Advisors (UTA's) are given the time and support necessary to perform this important task. Local Army Community Service offices should continue to utilize their volunteers to supplement the UTA's. The local judge advocate will serve as a valuable asset for training and technical advice. The Internal Revenue Service is also available to provide assistance to Army installations.

3. It is most important that our soldiers be made aware of the program and encouraged to take full advantage of this free benefit.

4. Our soldiers can be given better assistance in preparation of tax returns. I expect each of you to give this effort your full support.

### Family Law Notes

#### Command Nonsupport Messages

Army Regulation 608-99 has generated interest recently. The UPDATE version dated 22 May 1987 includes an important mechanism for enhanced support obligation enforcement, and it should prove useful to legal assistance attorneys. Lieutenant Colonel Arquilla's article in the June 1987 issue of *The Army Lawyer*, at 18, discussed the new regulatory provision that allows legal assistance attorneys to send command messages, with the local commander's authorization, inquiring why a soldier is not supporting his or her family members. See AR 608-99, para. 2-13.

The idea is that a delinquent soldier's commander may be more likely to promptly, and appropriately, respond to a command message inquiry than to a letter sent by a legal assistance attorney. Moreover, because the message represents an official request, the regulation calls for a detailed reply. Thus, as required by paragraph 1-4e(4), a response to a command message alleging nonsupport should include the following information: whether the soldier has been counselled about the allegation, and, if so, by whom; the soldier's commander's name, rank, organization, message address, and AUTOVON telephone number; the soldier's admission or denial of a support obligation, and the basis for any denial; whether the soldier admits a violation of the regulation, any reason offered for the violation, and the actions the soldier proposes to take to comply with the regulation in the future; any information the soldier has provided to support an assertion that support has in fact been paid, including dates and amounts of checks or money orders and details (date initiated, amount, name and address of payee) about any alleged allotments that have been or are to be initiated; action the soldier proposes to take to ensure his or her monthly support obligation is met during the processing period for any allotment that will be initiated; disciplinary action taken by the soldier's commander in response to any violation of the regulation that has occurred; and whether or not the soldier has consented in writing to release outside the Department of Defense (DOD) of information obtained from a system of records.

This wealth of information compares very favorably with the response that is required when a legal assistance attorney merely sends a letter on behalf of a client. Paragraph 1-4e(5) only mandates that a commander "answer" such correspondence, and "normally, replies will not include information obtained from a system of records without the soldier's written consent."

Legal assistance attorneys act on behalf of individual clients. Thus, the normal privilege of access to official information enjoyed by government attorneys does not apply in the legal assistance role; legal assistance attorneys are not "within DOD" when it comes to reviewing personnel files. The juxtaposition of the command message and legal assistance letter response provisions underscores this fact by implicitly noting the possibility that a response to a command inquiry may include information that would be unavailable to an attorney performing a legal assistance function.

There is a potential ethical trap for the unwary here. Suppose a legal assistance attorney initiates a command message inquiry on behalf of a spouse who alleges a failure of support in the amounts called for by AR 608-99. Suppose further that the response, addressed to the legal assistance attorney, includes information that the member's pay records show him to be supporting a recently born illegitimate child, a child about whom the client spouse knows nothing. Although received by the legal assistance attorney, this information has been provided to the local commander for official use. Worse, it has come from a system of records, and the Privacy Act prohibits disclosure outside DOD without the soldier's written consent.

Here are the horns of the dilemma. The attorney has a duty to zealously represent the client, and in this case the obligation certainly requires advising about the child. On the other hand, federal law prohibits this very disclosure. In this hypothetical case, the only remedy would be for the attorney to seek to be released from further representing the client. The basis for the request is the conflict between the role of a legal assistance attorney and the role of a legal advisor to the command, a role implicitly assumed by reviewing the response to the message.

A better approach would be to prevent the issue from ever arising. This can easily be accomplished by ensuring that all such command messages name a point of contact other than a legal assistance attorney. The installation commander and SJA may still properly delegate to legal assistance attorneys the authority to draft and send such messages, but responses should perhaps be directed to the administrative law section rather than the legal assistance section. Thus, the administrative law section office symbol could be listed as the releaser for the message. Of course, it would then be incumbent upon the administrative law section to advise the legal assistance attorney when a response has been received.

The arrival of a response raises another question—what can be done with the information? First of all, the command can take additional follow-up action as required, perhaps through coordination with the AG or through IG channels as appropriate (after all, obtaining support for geographically separated families is a command responsibility, not just a legal assistance function). Moreover, in some circumstances the information can be released to the legal assistance attorney. Disclosure will certainly be proper when the soldier has given his or her authorization. It is also permissible when the information was not gathered from a system of records; for example, statements made by the soldier during a counseling session with the commander could be released.

In summary, the recent change to AR 608-99 authorizing legal assistance attorneys to send command messages provides a potent weapon in the battle against nonsupporting soldiers. As with all weapons, however, it must be used with care. Legal assistance attorneys must understand that in sending a message they are acting on behalf of the commander, not their client. Therefore, they must take appropriate steps to avoid receiving information that cannot lawfully be passed on to the client. Major Guilford

#### *HQDA Nonsupport Assistance*

When commanders refuse to respond to nonsupport complaints, it may be time to call in a fire mission from HQDA.

MILPERCEN provides an office for assistance in these cases, and the mailing address is Cdr., U.S. Army Military Personnel Center, ATTN: DAPC-PDS, 2461 Eisenhower Avenue, Alexandria, VA 22331-0400.

This office handles about 2000 paternity and nonsupport inquiries per year. When the staff receives a request for assistance, they contact the soldier's commander, inquire about the allegation, review the commander's response, take appropriate follow-up action, and forward releasable information to the people who initiated the action. The turn-around time for this service is currently about four weeks, and there is an effort to reduce it to about two weeks.

You can help ensure that nonsupport complaints result in timely, effective responses when you write MILPERCEN. First, include the member's SSN in all correspondence. Additionally, identify by name the child whom the soldier is not supporting. Include *all* relevant facts regarding the soldier's support (or nonsupport) history (such as exact periods of nonsupport) and the family relationships in the case. State the remedy sought with as much specificity as possible (e.g., *which* household goods does the client want?). Finally, correlate your request for relief with the provisions of AR 608-99; it will do no good to ask MILPERCEN for assistance in getting an involuntary allotment against a soldier's pay, or for support in excess of the interim support requirement laid out in AR 608-99.

If a request for assistance goes unanswered, call or write the section chief, LTC Brokaw, directly. The AUTOVON telephone number is 221-8080. He requests, however, that such inquiries be reserved for cases where the normal procedure appears to have resulted in a breakdown of communication, not just unsatisfactory delays. He is aware that there are delays, and he is working to reduce them. Major Guilford.

#### *Former Spouses' Protection Act*

Recent comments in this Legal Assistance Items column regarding states' proclivity to divide gross retired pay rather than disposable retired pay have generated some interest. Case law shows that the following states have adopted a rule that their courts can divide gross pay.

California: *Casas v. Thompson*, 42 Cal.3d 438, 720 P.2d 921, cert. denied, 107 S. Ct. 659 (1986).

Minnesota: *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. App. 1984).

New Mexico: *White v. White*, 734 P.2d 1283 (N. Mex. Ct. App. 1987).

North Carolina: *Lewis v. Lewis*, 350 S.E.2d 587 (N.C. Ct. App. 1986).

North Dakota: *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984).

Texas: *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

West Virginia: *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987).

In some states, however, local law may circumscribe a court's authority to reach beyond disposable retired pay. For example, in Indiana marital property is statutorily defined to include "the right to receive disposable retired or retainer pay, as defined in 10 U.S.C. § 1408(a)." Ind. Code Ann. § 31-1-11.5-2(d)(3). This provision seems likely to

thwart a former spouse's claim for a portion of gross retired pay.

Virginia provides perhaps another example of a state limiting its courts' ability to divide the full amount of retired pay. Pensions and retirement income are generally divisible under Virginia law, and this includes military retired pay. *Sawyer v. Sawyer*, 335 S.E.2d 277 (Va. Ct. App. 1985). The state statute also provides, however, that "No [award of property based upon the value of a pension] shall exceed fifty percent of the cash benefits actually received by the party against whom the award is made." Va. Code Ann. § 20-107.3(G). While there is no relevant reported case, this provision certainly gives rise to an argument that "cash benefits actually received" can only mean disposable retired pay.

These notes on divisibility of gross pay are not exhaustive, but they demonstrate that when the parties cannot agree on how military retired pay should be divided, it is advisable to research applicable state law. Major Guilford.

### Tax Notes

#### Tax Savings Moves For 1987

Taxpayers have an opportunity to reduce their 1987 tax liability by taking advantage of changes to the 1987 and 1988 tax laws under the sweeping Tax Reform Act of 1986. Before the end of the year, taxpayers should become familiar with the changes to the tax laws and explore the various options available in reporting income and claiming deductions and credits to minimize federal income taxes.

The first step in tax planning is to determine taxable income and identify the applicable tax rate. For the most part, the five "blended" phase-in tax rates in 1987 will be higher than the three standard rates that will take effect in 1988. The top tax rate for individuals in 1987 will be 38.5%. This rate will decline to 28% for most taxpayers in 1988, although high income taxpayers will pay at a 33% rate to phase out the benefit of the 15% rate and the personal exemption. I.R.C. § 1(h) (West Supp. 1987).

Because the marginal tax rates in 1988 will be lower than the 1987 rates, the goal for most taxpayers should be to shift income from 1987 to 1988. This strategy not only takes advantage of the more favorable tax rates, but also gives the taxpayer the usual benefits of tax deferral. Taxpayers should also attempt to reduce their tax under the higher 1987 rates by accelerating 1988 deductions into 1987.

Not all taxpayers should defer income to 1988. Taxpayers who expect to move into a much higher rate in 1988 should not elect to defer income. Similarly, taxpayers anticipating a change in filing status in 1988, from married filing jointly to single for example, should not defer income if the new filing status will increase tax rates.

Another exception to the deferral strategy pertains to capital gains. The 1986 Act has repealed the exclusion for long-term capital gains and capped the maximum rate of tax on these gains at 28% in 1987 only. (I.R.C. § 1202, repealed by 1986 Act § 301(a)). In 1988, long-term capital gain will be taxed at the same rates as ordinary income (I.R.C. § 1(j), as amended by 1986 Act § 302(a)). Thus, high income taxpayers falling within the 33% rate in 1988

can take advantage of the 28% maximum applicable in 1987 by selling their capital assets this year.

Taxpayers should also consider "bunching" their deductions this year because increases in the standard deduction next year will make it more difficult to save tax by itemizing in lieu of taking the standard deduction. The standard deduction for married couples filing jointly increases significantly from \$3,760 in 1987 to \$5,000 in 1988. For single persons, the standard deduction available in 1987, \$2,540, will increase to \$3,000 in 1988 (I.R.C. § 63, as amended by 1986 Act § 102). Thus, individuals who have deductions approximating the standard deduction amount should make charitable contributions and other deductible expense payments this year. In 1988, these taxpayers will have lower itemized deductions but they can take the higher standard deduction amount.

The phase-out of the personal interest deduction over the next few years should also be considered in year-end tax planning. Under the 1986 Tax Reform Act, the deduction for personal interest is being phased out over a five-year period (I.R.C. § 163, as amended by 1986 Act § 511). This year, taxpayers may still deduct 65% of the interest paid on personal loans such as car and educational loans and credit card debts. Next year, however, only 40% of personal interest is deductible; in 1989, 20%; 10% in 1990; and beginning in 1991 such interest is fully nondeductible (I.R.C. § 163(h)(1), as amended by 1986 Act § 511(b)). Due to these declining allowances, interest payments will in most instances save more money if made this year. Note, however, that prepaid interest generally must be allocated over the life of the loan so that the taxpayer can deduct only the interest allocable to that year.

Taxpayers should also consider the changes in the deduction for home mortgage interest in their tax planning. Under the Tax Reform Act, interest on mortgage loans on a first or second home continues to be deductible, but only to the extent that the interest is attributable to loans that do not exceed the purchase price of the home plus improvements. If the debt was secured by the residence prior to 17 August 1986, and incurred prior to 17 August, the interest on all of the debt is deductible to the extent it does not exceed the fair market value of the home. Moreover, interest on home mortgage loans incurred to pay for educational and medical expenses is also deductible to the extent that the interest is attributable to loans that do not exceed the fair market value of the home. I.R.C. § 163(h) (West Supp. 1987).

Due to the changes in the personal interest and home mortgage interest deductions, homeowners who have personal interest loans should consider refinancing the mortgage on their residence and use the proceeds of the loan to pay off their personal indebtedness. As long as the loan is not more than the cost of the home plus improvements, the interest on the refinanced home mortgage loan will be fully deductible and the taxpayer will avoid nondeductible personal interest. Before taking this action, however, the taxpayer should determine if the actual costs incurred to refinance the home are more than the tax savings generated.

Effective tax planning requires testing various alternative projections of the future in light of applicable tax laws. To make intelligent decisions, the taxpayer must have an accurate picture of his or her situation and the tax laws not only



for this year, but for the following years as well. Thus, each taxpayer should conduct a thorough review of his or her personal situation in light of the changes in the tax laws before adopting any of the foregoing suggestions. Captain Ingold.

### *Tax Court Holds Officer May Deduct Change of Command Ceremony Expenses*

In a case that could have an impact on many military officers' tax returns, the Tax Court held that a Marine Corps lieutenant colonel could deduct the costs of a change of command function as a necessary and ordinary business expense under section 162 of the Internal Revenue Code (*Fogg v. Commissioner*, 89 T.C. 27 (1987)). The court also ruled on several other miscellaneous expense deductions related to military service and upheld a moving expense deduction for the cost of moving a sailboat to a new duty location.

On his 1982 tax return, LTC Fogg claimed \$1,309.00 as an employee expense deduction under section 162 for the cost of two entertainment events related to his change of command, a party at his home on the night prior to the change of command ceremony and a reception at the officer's club following the ceremony. The Tax Court disagreed with the contention that the expenses were not necessary as required under section 162, finding instead that the expenses were required to be incurred by LTC Fogg. The court examined the nature of the entertainment expenses and determined that the origin and character of both of the functions were directly related to Fogg's trade or business of being a military officer. Even though there was no direct order to incur the expenses, they satisfied the "necessary" requirement because a "hard headed businessman" in the same situation would have incurred them.

The Tax Court also considered the propriety of miscellaneous expense deductions claimed by LTC Fogg under section 162 as unreimbursed employee business expenses. At issue were deductions for the costs of printing stationery and calling cards, membership fees for the officer's club and the Blue Angels Association (an organization comprised of present and former pilots of the Blue Angels Squadron), and a contribution to the squadron officer's fund. The Tax Court ruled that only the contribution to the squadron officer's fund was deductible under section 162, finding that LTC Fogg failed to show that the other expenses were directly related to his trade or business of being a military officer. In upholding the deduction for the contribution to the squadron officer's fund, the court noted that LTC Fogg was expected to make a contribution to the fund and would have jeopardized his career if he refused to contribute.

The Tax Court also upheld LTC Fogg's section 217 deduction of \$2,530 for the unreimbursed expenses of moving a sailboat to his new duty location. The stipulated issue before the court was whether the sailboat was a "personal effect" within the meaning of Code section 217(b)(1)(A). This provision allows a deduction for the reasonable expenses of "moving household goods and personal effects." The court refused to apply a similar case in which the expense of moving a yacht was disallowed, stating that the issue was a factual question based on the circumstances of each case (*Aksomitas v. Commissioner*, 50 T.C. 679 (1968)). The evidence showed that the Fogg family used the boat extensively and stored personal property on it for living

aboard for several days. Accordingly, the Tax Court found that the sailboat was a "personal effect" and held that LTC Fogg was entitled to the deduction.

While the *Fogg* case provides military officers with a basis for claiming a deduction for unreimbursed entertainment expenses related to official military functions, the Tax Reform Act of 1986 will reduce the amount that can be deducted. Under the new law, only 80% of allowable entertainment expenses are deductible (I.R.C. § 162, as amended by 1986 Act § 142). The Act also imposes two additional requirements on the allowance of any food or beverage expense; the expense must not be lavish or extravagant, and the taxpayer must be present at the furnishing of the food or beverage. Finally, beginning this year, most miscellaneous itemized deductions, including unreimbursed business-related meal and entertainment expenses, will be subject to a new limit. The amount deductible will be limited to the total miscellaneous deductions that exceed two percent of the taxpayer's adjusted gross income. Captain Ingold.

### *IRS Issues Temporary Regulations Addressing Tax on Unearned Income of Minor Children*

The Internal Revenue Service (IRS) has issued temporary regulations addressing a Tax Reform Act of 1986 provision regarding the taxation of unearned income of minor children under the age of fourteen (52 Fed Reg. 33,577, (to be codified at 26 C.F.R. part 1)). Under the new law, the net unearned income of a child under fourteen will be taxed at the parent's marginal tax rate (I.R.C. § 1(i), as amended by 1986 Act § 1411). A minor child is, however, entitled to a standard deduction of \$500 and the first \$500 of unearned income will be taxed at the child's marginal rate. Thus, only unearned income in excess of \$1,000 will be taxed at the parent's marginal rate. The temporary regulations clarifying the new law are in a question and answer format and will apply to tax years after 1986.

The temporary regulations provide that the parent's marginal rate will apply to net unearned income of the child even if the income is attributable to property transferred to the child prior to 1987 (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 7). Moreover, the new rule will apply to unearned income of a child where the income is attributable to gifts from persons other than the child's parents, such as grandparents (Temp. Treas. Reg. § 1.1(i)-1T, Q & A).

The concept of unearned income is more than just interest and dividends, according to the temporary regulations. Unearned income includes social security and pension payments received by the child to the extent that those amounts are included in the child's gross income (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 9). Unearned income also includes trust income distributed to the child as a beneficiary to the extent that the distributable net income is included in the child's adjusted gross income (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 16).

The temporary regulations clarify that if the parents of the child are married and file separate returns, the marginal rate for determining the tax on the child's unearned income will be based on the return of the parent with the larger taxable income (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 11). The rate of the custodial parent is used if the child's parents are separated or divorced even if the custodial parent files a

joint return with a spouse who is not a parent of the child (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 12, 13).

If a parent's taxable income is adjusted due to an amended return or a tax audit, the child's tax must be recomputed if the adjustment has changed the parent's marginal tax rate. The child will be subject to interest, but not to penalties, if an additional amount of tax is due after the recomputation (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 17, 19).

Guardians and custodians of children under fourteen who need information regarding a parent's return should make written request to the IRS. The Service will disclose sufficient information about the parent's return to complete the child's return (Temp. Treas. Reg. § 1.1(i)-1T, Q & A 22). Captain Ingold.

#### *IRS Publications*

The IRS has issued a publication explaining the key features of the Tax Reform Act of 1986 affecting individuals. The publication, IRS Publication 920, *Explanation of The Tax Reform Act Of 1986 For Individuals* (Aug. 1987), discusses how major provisions of the 1986 Act differ from old law and identifies the provisions of the old law that have

been repealed. This general overview is followed by detailed discussions of the tax law changes with examples to illustrate some of the more complex aspects of the legislation. The publication also includes a description of the various taxpayer assistance programs provided by the IRS.

The Service has also prepared a publication, IRS Publication 921, *Explanation Of The Tax Reform Act Of 1986 For Business* (Aug. 1987), describing how the new law affects businesses. Both Publication 920 and 921 are available from the IRS free of charge.

Another helpful publication available from the Service is IRS Publication 910, *Guide To Free Tax Services* (Rev. Nov. 1986). This booklet contains an index and a description of the most often-requested IRS publications. The publication also describes the services and assistance available to help prepare income tax returns, answer questions, and resolve problems.

The IRS has advised that the 1987 edition of IRS Publication 17, *Your Federal Income Tax*, and the 1987 forms packages will not be available until 1988. Legal assistance offices should order these items from the Service in early December 1987. Captain Ingold.

## **Claims Report**

*United States Army Claims Service*

### **Using the Death on the High Seas Act to Evaluate Damages for Overseas Wrongful Death Claims**

*Lieutenant Colonel Jonathan P. Tomes  
Chief, Special Claims Branch*

#### **Introduction**

In some complex claims, determining liability is difficult. In many cases, however, computing the claimant's damages is more difficult and time-consuming than determining liability. With the 1987 revision of Army Regulation 27-20,<sup>1</sup> claims attorneys now have a new body of law to help them compute damages under the Military Claims Act (MCA)<sup>2</sup> for wrongful death occurring overseas. Previously, measuring damages in wrongful death claims was more difficult than under other claims acts because rather than using the law of the jurisdiction where the death occurred to measure damages, the Army has used general principles of American law, standing alone, to compute damages. Paragraph 3-11d of Army Regulation 27-20 (C5, April 1977), stated that "in claims arising in foreign countries quantum will generally be determined in accordance with general principles of American law as stated in standard legal publications." The new claims regulation, however, while

still using "general principles of American tort law"<sup>3</sup> to assess MCA damages, adds a specific body of law to help claims attorneys assess damages in wrongful death cases:

Where claims for wrongful death that are otherwise cognizable and payable under this chapter arise from an act or omission in a foreign country, the provisions of this paragraph will apply in determining proper damages. To the extent consistent with this paragraph, the general principles used to evaluate and assess damages under the Death on the High Seas Act (46 U.S.C. 761), as interpreted and applied by Federal Courts, will be used as general guidance in calculating a fair and equitable award.<sup>4</sup>

What is the "Death on the High Seas Act?" Congress enacted this law in 1920 to create a remedy for wrongful death occurring on the ocean outside the territorial limits of the United States because there was no wrongful death action, either at common law or in the general maritime law, under which the families of victims lost at sea could recover

<sup>1</sup> Dep't of Army, Reg. No. 27-20, Legal Services—Claims (10 July 1987) [hereinafter AR 27-20].

<sup>2</sup> 10 U.S.C. §§ 2733, 2736 (1982 & Supp. III 1985).

<sup>3</sup> AR 27-20, para. 3-10.

<sup>4</sup> AR 27-20, para. 3-12a.



damages.<sup>5</sup> Section 762<sup>6</sup> lists what damages a surviving family member may recover under the Death on the High Seas Act (DOHSA):

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Thus, the courts measure damages under the DOHSA by the monetary benefits that the decedent might have reasonably provided the beneficiaries had he lived. The courts have allowed recovery under the DOHSA for loss of support, services, and society; loss of care, guidance and training; future earnings; loss of inheritance; and loss of nurture. Courts interpreting the DOHSA have disallowed funeral expenses and damages predicated on loss of consortium, mental anguish or grief, and pain and suffering. Accordingly, one can see that allowable damages generally involve pecuniary loss to the persons bringing the suit.

Damages recoverable under the MCA are similar, but not identical, to those recoverable under the DOHSA. Paragraph 3-12c of Army Regulation 27-20 lists the following payable elements of damage:

(1) Damages awarded will be calculated based on the demonstrated pecuniary and non-economic losses suffered by the beneficiary as a result of the death of the decedent. Where a case requires economic assumptions to calculate future pecuniary losses, only generally accepted assumptions as evidenced by Federal case law and legal-economic publications will be used.

(2) Elements of damages not listed separately in this paragraph will be determined by application of law as stated in *a* above.<sup>7</sup>

(a) Loss of support, services, and other reasonably ascertainable monetary or otherwise valuable contributions a beneficiary could have expected to receive had the decedent lived;

(b) Loss of companionship, comfort, society protection, and consortium suffered by a spouse for the death of a spouse, a child for the death of a parent, or a parent for the death of a child;

(c) Loss of training, guidance, education, and nurture suffered by a minor child for the death of a parent during the remaining period of minority.

Paragraph 3-12d lists elements of damage that are not payable in wrongful death claims:

(1) Punitive or exemplary damages in any form. . . .

(2) Mental anguish, grief, bereavement, anxiety, or mental pain and suffering (of the survivors).

(3) Loss of companionship and society other than that suffered by a surviving spouse for the death of a spouse, a child for the death of a parent, or a parent for the death of a child.

(4) Loss of household services to a parent for the death of a minor child.

The regulation also provides that the settlement authority should not break the award down by elements of damage<sup>8</sup> and encourages the use of structured settlements.<sup>9</sup>

AR 27-20 does not incorporate the DOHSA to specify which elements of damages are payable and which are not: it merely provides a body of law to assist in determining the quantum of those damages allowed by the MCA and the regulation.

Thus, claims practitioners can look to the DOHSA to help assess wrongful death damages for loss of support, loss of care, guidance and training; loss of services (other than of household services to a parent for the death of a minor child); and loss of inheritance under the MCA. A number of DOHSA cases illustrate how to use this Act to assess these elements of damages. Because, however, the DOHSA does not permit the recovery of damages for loss of consortium, for funeral expenses unless they are actually paid by the survivors,<sup>10</sup> for loss of society and companionship, or for the decedent's pain and suffering<sup>11</sup> as does the MCA, general principles of American law will continue to determine those measures of damages.

## Damages Under the DOHSA

### Loss of Support (Lost Earnings)

The measure of recovery for lost earnings in wrongful death cases under the DOHSA is the "actual pecuniary benefits that the decedent's beneficiaries could reasonably

<sup>5</sup> *Mortenson v. Pacific Far East Line, Inc.*, 148 F. Supp. 71 (N.D. Cal. 1956).

<sup>6</sup> 46 U.S.C. 762 (1982). Section 761 of the act provides that the personal representative of the decedent may maintain an action in federal district court for the exclusive benefit of the decedent's spouse, parent, child, or other dependent relative.

<sup>7</sup> See *supra* note 3 and accompanying text.

<sup>8</sup> AR 27-20, para. 3-12e.

<sup>9</sup> AR 27-20, para. 3-13. A structured settlement is an alternative to a lump sum settlement in which the defendant purchases an annuity for the injured claimant or the surviving heirs that pays out a sum of money at regular times. It may, however, include a cash payment at settlement. If properly constructed, the annuity payments are tax-free to the recipient. See Huver, *Structured Settlements Provide Security*, Ins. Times, June 24, 1986; Huver, *Alternative—Structured Settlements Offer Great Advantages*, Pa. L.J.—Rep. June 9, 1986; Kennerly, *Structured Settlements: A Useful Tool for the Claims Judge Advocate*, The Army Lawyer, Apr. 1986, at 12. See also *Stineman v. Fontbonne College*, 664 F.2d 1082 (8th Cir. 1981).

<sup>10</sup> Although in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the U.S. Supreme Court allowed funeral expenses under the DOHSA where they were a pecuniary loss to a dependent because the dependent paid or became liable for them, the Eleventh Circuit subsequently assumed, without discussion, that funeral expenses were not recoverable under DOHSA, *Ford v. Wooten*, 681 F.2d 712, 714 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983). It should not be necessary for claims attorneys to look at the DOHSA to determine how much to pay for funeral expenses, however. Unlike other elements of damages, the claimants will normally have an itemized record of such expenditures.

<sup>11</sup> *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974). The DOHSA does not, however, preclude recovery of survival damages, such as the decedent's pain and suffering under general maritime law. See Balzarini, *Survival Remedies for Deaths on the High Seas*, 23 Duq. L. Rev. 981 (1985).

have expected to receive from the continued life of the decedent."<sup>12</sup> Determining those pecuniary benefits, however, is not easy, as one judge noted:

A margin of uncertainty is inevitable when one is called upon not only to resolve discrepancies in the evidence of past happenings, but also to look into the future. Indeed, no award for loss of future earnings is entirely free of speculative elements, and this is a problem that arises every day in the course of litigation. Insistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience.<sup>13</sup>

This lack of certainty does not leave a claims practitioner without guidance when evaluating lost earnings. Among the factors the courts have considered under the DOHSA are the decedent's life expectancy, the possibility of his having continued to practice his profession at an ascending or descending financial scale, the possibility of his early retirement, his health, and his prospects of advancement. Courts may also consider how much of his earnings he would have contributed to his beneficiaries considering their ages and circumstances.<sup>14</sup> The settlement authority may deduct that portion of the decedent's earnings that he would have spent for his own use from the amount of lost earnings.<sup>15</sup> Whether the settlement authority should reduce the quantum by the income taxes that the decedent would have paid on future earnings had he lived depends on whether the taxes would have had a "substantial effect" on the computation of probable future financial contributions to the beneficiaries.<sup>16</sup> Finally, the settlement authority must discount the aggregate amount of the decedent's future earnings to reflect its present value.<sup>17</sup>

## Loss of Care, Guidance, and Training

Claims practitioners looking for guidance in assessing damages for the loss of training, guidance, education, and nurture,<sup>18</sup> referred to in paragraph 3-12c(2)(c) of AR 27-20, suffered by a minor child upon the death of a parent during the remaining period of minority can also look to DOHSA cases. Among factors the courts have considered are how much time the decedent spent with his minor children,<sup>19</sup> the fitness of the parent to provide such training and whether he had done so during his lifetime,<sup>20</sup> and any special skill, education, or training that enabled him to impart such skill or training to the children.<sup>21</sup> Again, the courts have recognized that no mathematical formula exists to convert these benefits to the surviving children into a precise dollar figure.<sup>22</sup> Under the DOHSA, however, these damages are limited to the pecuniary value of the services the deceased parent would have provided and cannot include damages for the emotional loss the child suffers.<sup>23</sup>

## Loss of Services

Lost services involve various tasks the decedent performed at home for the benefit of his family.<sup>24</sup> These services may include maintenance of the home, managing financial affairs, and the like.<sup>25</sup> To evaluate the loss of the decedent's services, a claims practitioner must answer three questions: What services could the beneficiaries have reasonably expected to receive? How long would they have continued to receive them? How much would the services have been worth?<sup>26</sup> For example, in *Brown v. United*

<sup>12</sup> *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

<sup>13</sup> *Whitaker v. Blidberg Rothchild Co.*, 296 F.2d 554 (4th Cir. 1961).

<sup>14</sup> See, e.g., *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *The City of Rome*, 48 F.2d 333 (S.D. N.Y. 1930); *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D. Mass. 1968).

<sup>15</sup> *Consolidated Mach., Inc. v. Protein Products Corp.*, 428 F. Supp. 209 (M.D. Fla. 1976). In *Brown v. United States*, 615 F. Supp. 391 (D. Mass. 1985), the court used U.S. Department of Labor data that showed that the deceased father of a typical family of three would have spent 18% of his pre-tax income on personal maintenance before his daughter attained her majority and 23% thereafter to calculate what percent of earnings the decedent spent on personal maintenance. The court reduced this figure to 15%, however, because the decedent spent much of his time at sea during which he would have spent very little on himself.

<sup>16</sup> Cases with no deduction for income taxes include *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971) and *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D. Mass. 1968). Cf. *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), cert. denied, 389 U.S. 1044 (1968), which remanded the case to the district court with directions to reduce the damages for the income tax the decedent would have paid.

<sup>17</sup> *Brown v. United States*, 615 F. Supp. 391 (D. Mass. 1985).

<sup>18</sup> *Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir. 1975), defined loss of nurture as loss of guidance, care, and instruction.

<sup>19</sup> *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962).

<sup>20</sup> *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

<sup>21</sup> *Meehan v. Central R.R. Co.*, 181 F. Supp. 594 (S.D. N.Y. 1960).

<sup>22</sup> See *Mascuilli v. United States*, 343 F. Supp. 439 (E.D. Pa. 1972), rev'd on other grounds, 483 F.2d 81 (3d Cir. 1973).

<sup>23</sup> The court in *Brown v. United States* valued the economic value of the training and guidance the deceased father would have provided his daughter (who was born after his death) at \$5,000 a year increasing in value at a rate of 1.5% to reflect increasing productivity and discounted to present value at a 2% rate.

<sup>24</sup> *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

<sup>25</sup> See *Consolidated Mach., Inc. v. Protein Products Corp.*, 428 F. Supp. 209 (M.D. Fla. 1976) (case arising under general maritime law). See also Spangenberg, *Proof of Damages for Wrongful Death*, in *Wrongful Death and Survivorship* 63, 72-73 (W. Beall ed. 1958) which suggests that almost anything may be a compensable type of service:

Investigation may disclose that the decedent is a good handyman who repairs the vacuum cleaner, unclogs the plumbing, paints the house, points the mortar, washes the windows, sets the storm sash, builds cupboards . . . chauffeurs the family; and is an educator who trains the children in swimming, sailing, fishing, camping and other sports; and contributes also to their moral and religious training. The market value of all these services is subject to proof.

<sup>26</sup> J. Stein, *Damages and Recovery—Personal Injury and Death Actions* § 46 (1972).

States,<sup>27</sup> the decedent's wife was allowed \$3,000 per year in damages for loss of her husband's services increasing at 1.5% a year to account for general increases in productivity and in the value of money, discounted, however, to present value at a 2% rate.

### *Loss of Inheritance*

Most American jurisdictions recognize that the heirs of a decedent will suffer a pecuniary loss attributable to the extent that he may, if he had lived, have accumulated property that he would have passed on to them.<sup>28</sup> The DOHSA follows the majority of states and thus allows damages for the loss of an expected inheritance, discounted to present value.<sup>29</sup>

### *Elements of Damages not Payable*

Loss of consortium, loss of society and companionship, and funeral expenses are not payable under DOHSA. Thus, claims practitioners must look to general principles of American law to determine quantum when the claimant asserts such damages.

A question may arise whether claimants may recover for the decedent's predeath pain and suffering. Paragraph 3-12d of AR 27-20 does not expressly exclude the decedent's pain and suffering from payable damages because the language in subparagraph (2) refers to the survivors' mental pain and suffering. The decedent's pain and suffering is not,

however, listed in paragraph c as a payable element of damages. Arguably, physical pain and suffering could fall under subparagraph c(2) as a payable element of damages "not listed separately in this paragraph." Paragraph 3-12 was not intended to be a survival statute, however, and so does not authorize the payment of damages for the decedent's pain and suffering. But paragraph 3-11 does allow payment of a claim for the decedent's pain and suffering resulting from the personal injuries from which he later died. In that situation, claims attorneys should advise proper claimants to file two separate claims: a personal injury claim for the decedent's pain and suffering under paragraph 3-11 and a wrongful death claim under paragraph 3-12. The Claims Service will revise AR 27-20 to clarify the procedures in such situations.

### *Conclusion*

Although some questions remain about the interrelationship of AR 27-20 and the DOHSA, claims practitioners now have the benefit of an existing body of case law to assist in assessing damages for wrongful death under the MCA, at least to the extent not inconsistent with the regulation. Where the DOHSA is inconsistent or does not allow an element of damages that the MCA and the regulation allow, claims attorneys still have the general principles of American law to guide them in arriving at a measure of damages that will be fair both to the claimant and to the government.

<sup>27</sup> 615 F. Supp. 391 (D. Mass. 1985). The court computed the damages based on the widow's trial testimony:

At trial, Honour testified that she spends approximately six hours a week, or 300 hours a year, doing lawn and maintenance work that Gary used to do. She valued this work at six to eight dollars an hour, based on her experience as to what a third person would charge. In addition, she now has to hire others to do the work that Gary had previously done such as masonry and plumbing. Given the fact that Gary was able to perform the lawn and maintenance tasks faster than Honour, this court concludes that all such chores would have been accomplished by him within 300 hours a year. Ten dollars per hour is a reasonable estimate of the average worth of Gary's services, given the higher value of his plumbing and masonry work. This court further estimates that Gary would have performed this work through the age of 65.

*Id.* at 399.

<sup>28</sup> J. Stein, *supra* note 19, § 243 and the cases cited at note 20 therein. *But see* Zaninovich v. American Air Lines, Inc., 26 A.D.2d 155, 271 N.Y.S.2d 866 (1966), which held that in cases involving very young parents, at the start of their careers, the contingencies become extremely great, thus requiring all but total discounting of a potential inheritance.

<sup>29</sup> See Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (19); National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

## **Claims Notes**

### **Personnel Claims Notes**

#### *Increased Release Valuation Update*

Since the inception of Increased Released Valuation (IRV) for inter- and intrastate moves, the carriers, individually and through their organizations, have exerted great effort to eliminate or modify the effects of this initiative. Amendment language has been proposed to the Defense Authorization Bill, in both the House and Senate of the United States, to terminate the increased valuation program and revert back to sixty cents per pound per article, until the Comptroller General has made a report to Congress on the efficiency and cost effectiveness of the military claims settlement program. As an alternative to eliminating the program, the carriers proposed that the movers should have

the "OPTION" of settling claims directly with the military member of all shipments over 2,000 pounds.

It is open to question as to what, if any, of the language of the proposed amendment will find its way into law. In the interim, it is incumbent upon all military claims personnel to ensure that the payments of soldiers' claims are fully justified and can stand the test of impartial scrutiny by other federal agencies. By so doing, we will not be furnishing the carrier industry with ammunition to support their proposed legislation.

#### *Rounding Off Sums*

On August 10, 1987, the Army began rounding off the amounts allowed on personnel claims to speed up claims processing and reduce errors. For each line item on a claim,

amounts of fifty cents or more are rounded up to the nearest dollar, and amounts of forty-nine cents or less are rounded down. Claimants need to be told this when they pick up their claims forms.

The Individual Claims Record computer program will accept entry of an amount paid which exceeds the amount claimed by fifty cents or less, which will resolve most problems created by rounding sums. When a claim is adjudicated for a sum greater than the total of the dollars and cents claimed for each line item, claims personnel may simply round up the amount claimed on the Individual Claims Record.

This will not change the amount paid on a claim to any degree, but the check claimants receive will not have any cents on the end.

### Affirmative Claims Note

#### *Learning The Affirmative Claims Program*

What is the best way to approach learning the Army's affirmative claims program and maintaining resources for a successful local program? Begin with an overview of the new claims regulation, AR 27-20. Study chapter 14, which outlines both government property damage recovery and medical care recovery, and the referenced authorities; most of the important issues are developed there. Read the underlying statutes, 31 U.S.C. § 3711 and 42 U.S.C. §§ 2651-2653, their case notations, and the Department of Justice directives at 28 C.F.R. § 43. Then, review the Federal Claims Collection Standards and the legislative history of the Federal Medical Care Recovery Act. Become aware of the correct limits of your authority and the latest Office of Management and Budget (OMB) rates. Study the Claims Manual and all the past affirmative claims newsletters for guidance. Read chapters 11 and 12, DA Pam 27-162, which provide both a good general discussion and practical advice that will be useful when read together with the new regulation. Read DA Pam 360-506 on disability separation, and ARs 636-40 and 40-501 on disability processing and the profile system. An understanding of disability and medical profiles is necessary to intelligently act on requests for compromise or waiver of the government's lien. It will also be necessary to become familiar with insurance law; *Insurance Law—Basic Text* by Robert Keeton is an excellent claims library resource. Another good source of practical information and practice forms is the Affirmative Claims Handout distributed to all attendees at the 1987 Claims Training Workshop. New RJAs are also encouraged to contact the Affirmative Claims Branch, USARCS (AV 923-7256) for additional information and guidance.

### Tort Claims Notes

#### *Recent FTCA Denials*

**Contractor Operated GOV.** A garbage truck owned by the U.S. and operated under a contract struck a POV. The claim is not payable as the U.S. is not responsible for the negligent acts of an independent contractor (28 U.S.C. § 2671).

**Contaminated AAFES Fuel.** Motor damage was allegedly caused by water contaminated diesel fuel purchased at

either one of two AAFES service stations. Records maintained at both stations of daily measurements indicated that the appropriate water level in the underground tanks was not exceeded. The claim was denied.

**Detention for Shoplifting.** Claimant was released after being detained for approximately fifteen minutes by an AAFES store detective who suspected her of shoplifting. Claim was denied under the false arrest exception (28 U.S.C. § 2680(h)), *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977). The military police were not involved. If they were, the exception would not be applicable as military police are considered federal law enforcement officials and their actions must be judged on the basis of probable cause.

**Damage to State Highway on Army Post.** A state highway department filed claims for damage to state highways caused by heavy Army vehicles where the highways cross an Army post. An easement between the U.S. and the state provides that the U.S. is not responsible for such damage. Attention is directed to the Highways for National Defense Program, 23 U.S.C. § 210, AR 55-80.

**Defective AAFES Can.** Claimant purchased a can of paint and varnish remover at an AAFES store; the can leaked when he carried it home in the bed of his pickup truck. His claim, based on the sale of a defective can, was denied as the seller is not responsible for damage caused by the manufacturer's defective product under these circumstances.

#### *Loss of Mail Order Packages*

Claims for loss of or damage to insured mail are payable under chapter 3, AR 27-20, only when it can be shown that the loss or damage occurred while the mail was in the possession of the *military* postal system. Such claims can be properly filed by either the sender or the intended recipient. Where the sender is a business primarily engaged in catalogue sales and the intended recipient denies receipt, care must be taken to ensure that the allegation of nonreceipt is, in fact, correct. Usually this may be accomplished by comparing the signature, if any, that appears on the insured mail register of the Unit Mail Room (UMR) with that of the intended recipient, which can be obtained by requesting a copy of the original order from the sender, who is almost invariably the claimant in cases of this nature.

It should be noted that claims by Army and Air Force Exchange Service (AAFES) catalogue sales outlets are not payable under chapter 3 as AAFES is considered part of the Armed Forces. This is true even where AAFES has shipped a replacement item to its customer rather than disputing the loss. In such instances, the recipient is the proper claimant and if the recipient cannot show a loss, no proper claim lies.

Where the catalogue sales outlet uses the United Parcel Service (UPS) to effect shipment, and delivery is made to an UMR, there is no liability for the loss or damage to a package even though UPS can provide a proper signature of the UMR clerk. There is an express agreement under which UPS remains liable. The agreement is set out in appendix B, AR 65-75. We note that there has been an increase in claims in which UPS has been used by high volume catalogue sales outlets that cater to military personnel.

## Bicentennial of the Constitution

### Bicentennial Update: Ratification of the Constitution

*This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January and the April through October 1987 issues of The Army Lawyer.*

Despite the arguments of the anti-federalists (see *Bicentennial Update*, The Army Lawyer, October 1987, at 64), ratification of the Constitution went smoothly—at first. Although Pennsylvania was the first state to call for its ratification convention, the honor of first ratification went to Delaware. Its convention was little more than a formality, and on December 7, 1787, it unanimously approved the Constitution by a 34 to 0 vote. Pennsylvania followed five days later, and a week before Christmas, New Jersey added its name to the ratification list. During the first nine days of 1788, Georgia and Connecticut gave their approval. In a period of just six weeks, the Constitution had been blessed by five of the nine states needed to place the new government in operation (three of them unanimously).

The anti-federalists still had strong supporters in key states, however. Governor Clinton of New York ardently opposed ratification. Patrick Henry, Richard Henry Lee, James Monroe, and George Mason (who had refused to sign the Constitution), led the opposition in Virginia. Elbridge Gerry continued to voice his objections in Massachusetts. Among many citizens, they found a willing audience for their concerns about the possible abuse of power by a strong central government unchecked by a bill of rights.

These concerns, however, created a quandary for those who saw the necessity for a new government, but believed the Constitution was fatally flawed without a bill of rights. The Constitution contained provisions for amendment; it would be possible to add a bill of rights. The problem was that the amendment provisions (along with the rest of the Constitution) would not go into effect until nine states had ratified the Constitution. The only other way to modify the Constitution would be to hold a second constitutional convention. This proved to be an unpalatable alternative. George Washington especially disapproved of the idea of a second convention (a favorite proposal of the anti-federalists). After the fiery debate and antagonism experienced in the first convention, and the numerous compromises imbedded in the Constitution it prepared, he saw little chance that a second convention would do any better.

This left many state delegates facing two equally unpleasant alternatives: vote against the Constitution and see the dream of a new government fall, or vote for the Constitution (even with the major flaws they felt it had) and take a chance on an unchecked abuse of power. The debate came to a head in Massachusetts, one of the preeminent colonial states. Here the tide in favor of the Constitution had quickly ebbed, and ratification was in doubt. Constitution

proponents, facing a crisis, devised yet another compromise that made ratification possible. They suggested that the states propose amendments to the Constitution, but not as a condition of ratification. The proposed amendments would be a recommendation only, albeit one that the states were "convinced" would receive proper consideration. After the Constitution went into effect, its amendment provisions would provide the vehicle to meet the states' concerns. While opponents remained unconvinced, this proposal swung enough uncommitted votes. On February 6, 1788, Massachusetts ratified the Constitution by a slim 187 to 168 margin.

The compromise proposal set the pattern for later ratification votes. All but one state that followed Massachusetts in 1788 proposed amendments. New Hampshire's convention initially met and immediately adjourned. This disturbed the federalists, but probably saved the ratification vote (At the time, a majority of the New Hampshire delegates had orders to oppose ratification.). Maryland ratified on April 28 by a vote of 63 to 11, and South Carolina on May 23, with a 149 to 73 vote. The New Hampshire convention reassembled and, on June 21, 1788, it provided the ninth ratification vote, which placed the Constitution into effect.

Despite this success, crucial ratification votes remained in Virginia and New York. These states, because of their geographical location and economic importance, would be needed in any new government. In both states, Constitution proponents and opponents engaged in a spirited struggle for convention votes. James Madison spearheaded the effort in Virginia, along with Governor Edmund Randolph (even though he had refused to sign the Constitution) and the relatively young John Marshall (who would later carve his own niche in constitutional history). George Washington and Benjamin Franklin also influenced the delegates; their signatures on the Constitution carried considerable weight. Both states finally approved the Constitution, again by slim margins. Virginia ratified by an 89 to 79 vote on June 26, 1788, and New York ratified by a 30 to 27 vote a month later.

Only North Carolina and Rhode Island failed to follow. The North Carolina convention adjourned on August 4, 1788, after voting that Congress should consider a long list of amendments (or a second constitutional convention called) before that state ratified. Rhode Island refused to even elect delegates to a ratification convention. Later, however, two things changed both states' minds: the new government went into operation and the two were in danger of being treated as foreign countries, and Congress approved the Bill of Rights and sent it to the states for approval on September 26, 1789. North Carolina ratified on November 21, 1789, and Rhode Island joined the fold on May 29, 1790, but, even then, only by a 34 to 32 margin.

## Designated Bicentennial Defense Communities

We continue to receive reports of new additions to the list of Designated Bicentennial Defense Communities. Over 80 Army communities have now applied. The communities below are in addition to those announced in the October 1987 issue of *The Army Lawyer*, at 65:

**United States Communities:** Aberdeen Proving Ground; Anniston Army Depot; Arizona National Guard; Arlington Hall Station; Aviation Support Command, Saint Louis; Fort Bliss; Carlisle Barracks; Fort Carson; Colorado National Guard; Corpus Christi Army Depot; D.C. National Guard; Dugway Proving Ground; Fort Lee; Fort Leavenworth; Fort Leonard Wood; Fort McClellan; Military District of Washington; Missouri National Guard; Fort

Monmouth; Fort Monroe; Fort Ord; Pennsylvania National Guard; Picatinny Arsenal; Fort Polk; Red River Army Depot; Redstone Arsenal; Fort Riley; Fort Rucker; Seneca Army Depot; Fort Story; Tobyhanna Army Depot; 6th Infantry Division, Alaska; and the 97th ARCOM.

**Federal Republic of Germany:** Ansbach Military Community; Augsburg Military Community; Bad Kreuznach Military Community; Bamberg Military Community; Heidelberg Military Community; Pirmasens Military Community; Schweinfurt Military Community; and Stuttgart Military Community.

**Italy:** Vicenza Military Community.

**Japan:** Camp Zama; Torri Station, Okinawa.

## Guard and Reserve Affairs Item

*Judge Advocate Guard & Reserve Affairs Department, TJAGSA*

### Reserve Component Promotions Update

*Reserve Component Selection Board Convenes  
1 March 1988*

A selection board will convene 1 March 1988 in St. Louis to consider captains, USAR and NG, for reserve promotion to major. The zone of consideration will include all reserve captains on the Army Promotion List (APL) who have dates of rank of May 16, 1982 and earlier.

Records and documents to be reviewed by the board will include an officer's Official Military Personnel File (OMPF), Officer Record Brief (ORB) or DA Form 2-1, and photograph. The promotion panel will use the "fully qualified" (no quota) method of selection.

Officer Evaluation Reports (OER) must be submitted in time to arrive at ARPERCEN (ATTN: DARP-PRE-O) by 1 March 1988. Code 11 OERs are mandatory for most NG, AGR, and USAR Troop Program Unit (TPU) officers who were passed over for promotion by the 1987 APL reserve Majors Board that adjourned 25 March 1987. Captains who have received an OER or Academic Report with a through date of 7 May 1987, or later, are not eligible for this type report. Code 21 "complete-the-record" OER's are optional for AGR and NG officers who meet the requirements of paragraphs 5-21 and 8-24 of AR 623-105 (OER System). A list of codes used as reasons for submitting evaluation can be found in Appendix K, AR 623-105. The required through date for Code 21 and Code 11 reports is 2 December 1987. The minimum rating period requirement for NG and USAR/TPU officers is 120 days. The minimum for AGRs is 90 days.

Officers who are in a zone of consideration may submit a letter to the board regarding matters they feel are important in the consideration of their record. Letters should be sent to: President, 1988 Majors APL Promotion Board, ATTN: DAPC-MSL, 9700 Page Boulevard, St. Louis, MO 63132-5200. Letters read by a promotion board will become a matter of record for that board. They will be

maintained by the Military Personnel Center (MILPERCEN), but they will not be placed in an officer's official file. Letters of recommendation from other parties, or letters that reflect on the character, motives, or conduct of other people, will not be presented to the selection board.

Physical examinations must be current for an officer to be promoted. If a physical will be more than four years old before your promotion eligibility date, schedule a new physical early to ensure you can get it recorded in your file. The Army will not issue promotion orders if an officer's physical is out of date.

Officers who are in the zone of consideration will be sent a copy of their official file for review. Missing documents, corrections, or additions to the file should be submitted to the 1988 Major APL Promotion Board, ATTN: DAPC-MSL, 9700 Page Boulevard, St. Louis, MO 63132-5200.

### Promotion Consideration File (PCF)

The PCF is prepared by the Promotions Directorate for use by the Reserve Component selection boards. It should contain the following:

1. All rendered academic and performance evaluation reports.
2. An Officer Record Brief or DA Form 2-1 (Personnel Qualification Record). Entries pertaining to personal data, military and civilian education, and duty assignment history are required.
3. A photograph taken within the past three years. Height and weight data and signature should be entered on the reverse side of the photograph per AR 135-155, paragraph 3-3a(4).
4. The officer's letter to the board president, if provided.

A summary of the contents is set forth in the table below.

Data for compiling the PCF is available from the OMPF and the Career Management Individual File maintained at



ARPERCEN. When not found there, it may be available at the unit/field file or in the individual's personal records.

Officers in the zone of consideration are responsible for the following:

1. Reviewing their OMPF and providing ARPERCEN a copy of any documents missing from the file.
2. Auditing their DA Form 2-1, when requested by the unit personnel clerk.
3. Ensuring they have a current photograph on file at ARPERCEN.
4. Taking a physical every 4 years IAW AR 40-501. If overweight, ensuring their status in the weight control program is reported to ARPERCEN IAW AR 600-9, paragraph 211. Promotion orders will not be issued to an officer whose physical is out of date or who is overweight.
5. Following up with unit support personnel to ensure that evaluation reports, the DA Form 2-1, and other relevant information gets submitted to ARPERCEN in time to be presented to the board.

### Contents of PCF

	IRR/IMA	AGR	TPU	DC	NG	Remarks
OMPF-P-Fiche	X	X	X	X	X	1,7
2-1			X		X	2
ORB	X	X		X		3
Photo	X	X	X	X	X	4
Letter to the Board President	X	X	X	X	X	5
Loose Papers	X	X	X	X	X	6

1. Provided by U.S. Army Reserve Personnel Center (ARPERCEN)/National Guard Records Services Division, as appropriate.
2. Provided by the officer's servicing personnel/administrative section.
3. Provided by an ARPERCEN personnel management officer. If Dual Component, provided by ARPERCEN.
4. To be provided by the officer for the board's use or by the personnel management officer (PMO) if a current copy is available in the career management file. The photo must be current within three years.
5. Optional.
6. Includes Official Military Personnel File (OMPF) documents received too late to be added to the OMPF (Performance-Fiche).
7. OMPF performance documents required to be included in the PCF include (listed in order of precedence):
  - Academic Evaluation Reports.
  - Officer Evaluation Reports.
  - Letter Reports.
  - Resident and nonresident course completion certificates.
  - Article 15s.
  - Letters of reprimand.
  - Unfavorable information submitted in accordance with AR 600-37.
  - Award Orders.
  - Letters of appreciation/commendation.

### Letter to the Board

Normally, there is no purpose served by writing to the board. The OMPF, if properly maintained, adequately documents your career achievements and potential for promotion board consideration. In many cases, a soldier's letter tends to detract from the file because of irrelevancy, poor grammar and spelling, too many superfluous enclosures, and sloppy preparation.

If you decide to write, your letter should be short (one page maximum), provide information not already contained

in the OMPF, relevant, free of punctuation and spelling errors, signed, and dated. The letter should be a crisp, professional document in appearance, style, and content.

Items such as the following make good enclosures to your letter and attest to your good judgment: current photo; OERs missing from OMPF; letters of appreciation/commendation not in OMPF; newly acquired diplomas, degrees, and items pertaining to professional stature; information concerning civilian skills that validate qualifications in a comparable military skill; and statements documenting maximum allowable weight, if appropriate. All enclosures should be referenced in the letter.

The following enclosures are normally irrelevant and tend to detract from your letter: TDA extracts; oath of office; sick call slip; DD Form 149 (Request for Correction to Military Records); DA Form 1379 (USAR Record of Reserve Training); application for correspondence course enrollment; subcourse completion certificates; subcourse completion grades; individual reassignment orders; ADT/SADA orders; promotion/appointment orders; physical examination/panoramic dental x-rays; DA Form 635 (Recommendation for Award); correspondence downgrading a proposed award; DA Form 873 (certificate of clearance); curriculum for USARF school course; APFT score sheets; pay vouchers; retirement point sheets; DA Form 1380 (Record of Individual Performance of Reserve Duty Training); results of AGR continuation board; DD Form 214; unit training schedule; etc.

### OERs—Center of Mass Concept

OERs are obviously an important part of your PCF. One part of the OER that is not understood by all is the senior rater profile. The core concept of the senior rater profile is the center of mass concept. The center of mass concept establishes a consistency between the way senior raters evaluate and the way selection boards interpret the evaluation. This assists in ensuring that the message sent by the senior rater is the same as the one received by the selection board. This, in turn, provides sufficient senior rater confidence to accept the opportunity to indicate the very best and those below the standard without fear of hurting all the rest.

Currently there is no USAR Senior Rater Profile Restart Program as there is in the Active Component. ARPERCEN is developing the requirements for a Restart Program. Due to other priorities and constraints, implementation of the RC Restart Program may be delayed until the end of CY 88. When the program is implemented, it will contain provisions such as: there will be personal contact with the senior rater, individual restart is never automatic; restart capability will be for one or more grades; restart is based on senior rater signature date; and a caution against changing or shifting rating philosophy prior to the restart date.

Do not shift philosophy prior to restart of the senior rater profile. A shift in rating philosophy without benefit of a restart may not convey the intended potential evaluation to selection boards. Senior raters of USAR officers should not change their rating philosophy unless they are absolutely sure that the USAR Restart Program has been implemented, and that their profiles have been restarted.

Senior raters may have up to three separate senior rater profiles if they senior rate officers from the AC, ARNG, and USAR.

The center of mass concept provides the senior rater with the power to give a boost to the very best; protects quality officers senior rated by an officer who believes no one should be rated in the top two boxes; and establishes senior rater credibility. The value of the box checked depends on the profile. The center of mass, or the "pack," is normally the most frequently used box; it may be dual boxes if two boxes are used with essentially the same frequency. The selection board is instructed to look at the box checked in relation to the "pack" (most frequently used box) and make an assessment; is the officer ahead of the pack, with the

pack, or behind the pack. Then the board members are to read the narrative and move on to the next OER. The narrative is very important, but glowing words fall short if the board member has already determined that the senior rater's review is behind the "pack."

Selection board members are also briefed on what is a bad, or non-credible profile. If more than fifty percent of the ratings are in the top box, or if it is unmistakably the most frequently used box, the senior rater's block loses its meaning in the selection process because the best are hidden with the good. A small profile does not communicate anything to the board, and as a result the narrative carries the entire weight.

## Enlisted Update

*Sergeant Major Dwight Lanford*

### Enlisted Courses

To assist in budget preparation and planning for enlisted personnel training in FY 88, the following is a list of projected courses:

a. Courses to be held at TJAGSA, Charlottesville, Virginia:

(1) Law for Legal Noncommissioned Officers (512-71D/20/30), 18-22 April 1988.

(2) Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50), 12-15 July 1988.

(3) 17th Law Office Management Course (7A-713A), 18-22 July 1988.

b. Courses to be held elsewhere:

(1) 8th Worldwide 71D/71E Refresher Course (Refresher 512-71D/71E/10/20/30), 6-11 March 1988, Presidio of San Francisco, California.

(2) Air Force Legal Service Advanced Course (for selected personnel), 23 May-3 June 1988, Maxwell Air Force Base, Alabama.

(3) Air Force Claims Course (for selected personnel), 11-22 July 1988, Maxwell Air Force Base, Alabama.

c. Attendance at the Basic NCO Course (BNCOC), Advanced NCO Course (ANCOC) and the U.S. Army Sergeants Major Academy (USASMA) requires centralized selection and funding by HQDA.

d. Nonresident (correspondence) TJAGSA courses available for enlisted soldiers:

(1) Law for Legal Specialists, 18 credit hours.

(2) Law for Legal Noncommissioned Officers, 90 credit hours.

(3) Army Legal Office Administration, 184 credit hours.

### Promotions

Do I stack up? Will that DA Centralized Promotion Board select me to the next higher grade? Or should I retire? Maybe I should reclassify into another MOS to get promoted? We will look at MOS 71D and 71E and DA Centralized Promotion Boards to see if your questions can be answered.

1. Physical Fitness. CMF 71 soldiers have a higher number of profiles than would be expected due to frequent reclassification of soldiers into this CMF. It must be remembered that fitness is an important element of a soldier's professional competence. Although the selection process gives full consideration to valid profiles and medical board decisions, there is universal agreement that the senior NCO must set the example in all manners of performance. Failure of the APFT, the alternate test, or evidence of sub-standard physical conditioning are viewed as very serious when making promotion decisions using the "whole soldier" concept. (EERs often fail to adequately address the rated soldier's situation as it pertains to the APFT.)

2. Weight. Inconsistencies in height/weight data on EERs are viewed as lack of attention or integrity. Often soldiers "grow" 1 to 3 inches, data is not consistent with actual appearance in the official photo, and there is no record of the date of pinch test or tape measure on the EER. (Overweight soldiers are not competitive.)

3. SQT. Soldiers with no record of SQT scores when there has been a test administered or with outdated scores are at a disadvantage.

4. Education. In both military and civilian education, too many soldiers are content to do only the minimum. Some records indicate only high school or GED, no ANCOC, no professional refresher courses, no correspondence courses, etc. Many soldiers appear to "relax" once they achieve an associate degree or ANCOC and do nothing more to improve themselves. Education beyond the minimal is a definite "initiative" indicator.



5. **Assignments.** Assignment to challenging jobs where soldiers can gain supervisory experience or perform difficult tasks increases promotion potential. Soldiers should seek a variety of tough jobs rather than "homesteading."

6. **Photograph.** This is one of the most important items in the file. The photograph must be updated every three years or when promoted. Make sure that the uniform is well fitted (sleeves and pants the correct length; proper placement of insignia, ribbons, clusters, and awards; no wrinkles in uniform; hair and mustaches trimmed to regulation requirements). Outdated or no photograph impacts negatively. Retake a photograph rather than permitting a less-than-satisfactory one to be submitted.

7. **EER.** This is the other most important item in the file. Make sure, under "DUTY DESCRIPTION," Part II, that a concise description of your daily duties is listed. The duty description must explain actual work performed and overall scope of responsibility. Under "EVALUATION OF PROFESSIONALISM/PERFORMANCE," Part III, verify the

accurate height/weight data. Soldiers on the overweight program must have comments on progress and dates of testing. The narrative must say what the rated soldier did and how well it was done. Specific items of professional competence or standards should be amplified. Quality comments far outweigh quantity. Excess verbiage detracts rather than enhances.

8. **Review Files.** It is inexcusable for a soldier not to review and sign his or her record as required.

Soldiers must actively participate in their career management. Seek challenging assignments. Check your records periodically to ensure that the good things you have done are properly recorded. The aim of the DA Centralized Promotion Boards is to select a "leader" under the "whole soldier" concept. This leader must be qualified with respect to education, integrity, and demonstrated leadership potential. Start constructing, with the help of your supervisors, a competitive record at the earliest point of your career.

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

### 2. TJAGSA CLE Course Schedule

December 7-11: 3d Judge Advocate and Military Operations Seminar (5F-F47).

December 14-18: 32d Federal Labor Relations Course (5F-F22).

1988

January 11-15: 1988 Government Contract Law Symposium (5F-F11).

January 19-March 25: 115th Basic Course (5-27-C20).

January 25-29: 92nd Senior Officers Legal Orientation Course (5F-F1).

February 1-5: 1st Program Managers' Attorneys Course (5F-F19).

February 8-12: 20th Criminal Trial Advocacy Course (5F-F32).

February 16-19: 2nd Alternate Dispute Resolution Course (5F-F25).

February 22-March 4: 114th Contract Attorneys Course (5F-F10).

March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).

March 14-18: 38th Law of War Workshop (5F-F42).

March 21-25: 22nd Legal Assistance Course (5F-F23).

March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18-22: 17th Law Office Management Course (7A-713A).

July 25-September 30: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1–May 20, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

### 3. Civilian Sponsored CLE Courses

*February 1988*

3: PBI, Directors' and Officers' Liability Update, Kittanning, PA.

3: PBI, Workers' Compensation Practice (Video), State College, PA.

7–12: NJC, Dispute Resolution, Reno, NV.

7–12: NJC, Developing a Court Information System (Advanced Computers), Reno, NV.

7–12: NJC, Alcohol & Drugs & the Courts, Reno, NV.

7–11: NCDA, Office Administration, Reno, NV.

8–12: GCP, Administration of Government Contracts, Washington, D.C.

11–12: PLI, Preparation of Annual Disclosure Documents, San Francisco, CA.

11–12: PLI, Leveraged Acquisitions and Buyouts, San Francisco, CA.

11–12: PLI, Partnership Taxation, New York, NY.

11–12: PLI, Estate & Financial Planning for the Aging Client, Tampa, FL.

11–13: ALIABA, Environmental Law, Washington, D.C.

11–13: ALIABA, Real Estate Syndications, Los Angeles, CA.

12–13: UKCL, Securities Law, Lexington, KY.

17–19: ALIABA, Tax & Business Planning for the late 80's, Coronado, CA.

18–19: ALIABA, Southern Securities Institute, Miami, FL.

18–20: NELI, Employment Law Litigation, San Francisco, CA.

18–20: ALIABA, Advanced Estate Planning Techniques, Maui, HI.

19: PBI, Buying & Selling a Business (Video), Ridgeway, PA.

21–25: NCDA, Experienced Prosecutor Course, Hilton Head, SC.

21–26: NJC, Current Issues in Family Law, San Diego, CA.

21–26: NJC, Probate, San Diego, CA.

21–3/4: NJC, Administrative Law: Fair Hearing, Reno, NV.

22–23: PBI, Mechanics of Underwriting, Chicago, IL.

22–23: PLI, Current Developments in Bankruptcy & Reorganization, New York, NY.

22–23: PLI, Preparation of the Fiduciary Income Tax Return, New York, NY.

24–26: SMU, Symposium on Personal Injury and Products Liability, Lake Buena Vista, FL.

25: MBC, Conference on Construction Law, St. Louis, MO.

25–26: PLI, Distribution and Marketing, San Francisco, CA.

25–26: PLI, Asset-Based Lending Including Commercial Finance, San Francisco, CA.

25–26: PLI, Hostile Battles for Corporate Control, New York, NY.

25–26: PLI, Executive Compensation, New York, NY.

25–27: PLI, Workshop on Direct and Cross Examination, New York, NY.

26: UKCL, Evidence and Trial Practice, Louisville, KY.

26: NCLE, Corporate Practice, Omaha, NB.

28–3/2: NCDA, Child Abuse & Exploitation, Los Angeles, CA.

28–3/4: NITA, Advanced Trial Advocacy Program, Gainesville, FL.

29–3/1: PLI, Leveraged Acquisitions and Buyouts, Chicago, IL.

29–3/1: PLI, Advanced Bankruptcy Workshop, San Diego, CA.

29–3/4: GCP, Cost Reimbursement Contracting, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1987 issue of *The Army Lawyer*.

### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 30 July annually
Florida	Assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	1 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	31 December in even or odd years depending on admission

For addresses and detailed information, see the July 1987 issue of *The Army Lawyer*.

## Current Material of Interest

### 1. FEDERAL BAR ASSOCIATION AWARD

Each year, the Federal Bar Association selects outstanding young federal attorneys for the "Younger Federal Lawyer Award." Civilian and military lawyers under age thirty-six with three years of federal service are eligible. The purpose of the award is to encourage younger federal lawyers to attain high standards of professional achievement and to publicly recognize outstanding performance. A panel of distinguished federal judges select the award recipients.

On September 18, 1987, at an awards luncheon in Memphis, five outstanding attorneys received the 1987 Younger Federal Lawyer Award. Among the 1987 awardees is Major Thomas O. Mason, an instructor in the Criminal Law Division, The Judge Advocate General's School. Major Mason joined the faculty of The Judge Advocate General's School in 1985. His expertise includes trial advocacy, sixth amendment issues, and crimes and defenses.

### 2. Public Contract Law Committee Seeks Members

Lieutenant Colonel James F. Nagle, OSJA, FORSCOM, is the chairman of the Public Contract Law Committee of the American Bar Association's General Practice Section. The committee is interested in soliciting JAGC membership in keeping with Policy Letter 86-7, Office of The Judge Advocate General, U.S. Army, subject: Professional Organizations and Activities, 14 May 1986, *reprinted in The Army Lawyer*, July 1986, at 3. It is one vehicle for judge advocates to enhance their knowledge of government contracts and to participate in the ABA.

In order to be on the committee, one must be a member of the ABA and its General Practice Section. To join the ABA and the Section, contact Deb Owen at the ABA, 750 North Lake Shore Drive, Chicago, IL 60611, (312) 988-5648. LTC Nagel may be contacted at AUTOVON 572-3529/3604 or (404) 752-3529/3604.

### 3. TJAGSA Publications Available Through the Defense Technical Information Center

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- |            |   |
|------------|---|
| AD A181445 | Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs). |
| AD B112163 | Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs). |
| AD B100234 | Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).                                  |
| AD B100211 | Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).                         |

#### Legal Assistance

- |            |   |
|------------|---|
| AD A174511 | Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs). |
| AD A174509 | All States Consumer Law Guide/JAGS-ADA-86-11 (451 pgs).   |
| AD B100236 | Federal Income Tax Supplement/JAGS-ADA-86-8 (183 pgs).  |
| AD B100233 | Model Tax Assistance Program/JAGS-ADA-86-7 (65 pgs).  |
| AD B100252 | All States Will Guide/JAGS-ADA-86-3 (276 pgs).  |
| AD A174549 | All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).  |
| AD B089092 | All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).   |
| AD B093771 | All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).  |
| AD B094235 | All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).   |
| AD B114054 | All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).  |
| AD B090988 | Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).   |
| AD B090989 | Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).  |
| AD B092128 | USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).  |
| AD B095857 | Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).  |
| AD B110134 | Preventive Law Series/JAGS-ADA-87-4 (196 pgs).  |

#### Claims

- |            |   |
|------------|---|
| AD B108054 | Claims Programmed Text/JAGS-ADA-87-2 (119 pgs). |
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#### Administrative and Civil Law

- |            |   |
|------------|---|
| AD B087842 | Environmental Law/JAGS-ADA-84-5 (176 pgs).  |
| AD B087849 | AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).                      |
| AD B087848 | Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).                                     |
| AD B100235 | Government Information Practices/JAGS-ADA-86-2 (345 pgs).                                   |
| AD B100251 | Law of Military Installations/JAGS-ADA-86-1 (298 pgs).                                      |
| AD B108016 | Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).                                       |
| AD B107990 | Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).                   |
| AD B100675 | Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs). |

#### Labor Law

- |            |   |
|------------|---|
| AD B087845 | Law of Federal Employment/JAGS-ADA-84-11 (339 pgs). |
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AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

#### Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).

AD B088204 Uniform System of Military Citation/JAGS-DD-84-2 (38 pgs.)

#### Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

#### 4. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 11-20	Army Nonstrategic Nuclear Forces Survivability, Security, and Safety (NSNFS3) Program		18 Sep 87
AR 601-70	Voluntary Active Duty with Chaplain Branch	101	2 Aug 87
AR 601-210	Regular Army and Army Reserve Enlistment Program		11 Sep 87
AR 608-18	The Army Family Advocacy Program		18 Sep 87
AR 700-131	Loan and Lease of Army Material (Supersedes AR 735-8)		4 Sep 87
AR 700-138	Army Logistics Readiness and Sustainability		18 Sep 87
DA Pam 385-16	System Safety Mc-T Guide		4 Sep 87
DA Pam 525-15	Joint Force Development Process		15 Jun 87
DA Pam 700-28	Integrated Logistic Support Program Assessment Issues and Criteria		4 Sep 87
JFTR	Joint Federal Travel Regulation, Vol. I	10	1 Oct 87
UPDATE 9	Finance Update		23 Sep 87
UPDATE 12	Enlisted Ranks Personnel		2 Sep 87

#### 5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

*Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 Real Prop. Prob. & Tr. J. 1 (1987).

Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 31 Trial Law. Guide 1 (1987).

Hazelton, *The Federal Circuit's Emerging Role in Bid Protest Cases*, 36 Am. U.L. Rev. 919 (1987).

Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 Rev. Litigation 129 (1987).

*Professional Ethics*, 5 Behavioral Sci. & L. 105 (1987).

McLure, *Where Tax Reform Went Astray*, 31 Vill. L. Rev. 1619 (1986).

Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 Colum. J. Transnat'l L. 35 (1986).

Mushkat, *Is War Ever Justifiable? A Comparative Survey*, 9 Loy. L.A. Int'l & Comp. L.J. 227 (1987).

Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 Cardozo L. Rev. 515 (1987).

Smythers, *Civilian Lawyers in Military Courts*, 23 Trial 55 (1987).

Suplee & Woodruff, *The Pretrial Use of Experts*, Prac. Law., Sept. 1987, at 9.

*Symposium: Toxic Waste*, 38 Rutgers L. Rev. 619 (1986).

Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 Harv. Women's L.J. 59 (1987).

Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 Vand. J. Transnat'l L. 53 (1987).

Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 Hastings L.J. 889 (1987).

Comment, *Espionage: Anything Goes?*, 14 Pepperdine L. Rev. 647 (1987).

Comment, *Why Congress Should Not Legislatively Repeal the Feres Doctrine—A Struggle in Equity*, 18 Tex. Tech L. Rev. 819 (1987).

Commentary, *Criminal Procedure: Closed-Circuit Testimony of Child Victims*, 40 Okla. L. Rev. 69 (1987).

Note, *Application Problems Arising From the Good Faith Exception to the Exclusionary Rule*, 28 Wm. & Mary L. Rev. 743 (1987).

Note, *Covert Wars and Presidential Power: Judicial Complicity in a Realignment of Constitutional Power*, 14 Hastings Const. L.Q. 683 (1987).

Note, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 Ecology L.Q. 117 (1987).

Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 Yale L.J. 2082 (1987).

Note, *The Public Employee Can Disagree With the Boss—Sometimes*, 66 Neb. L. Rev. 601 (1987).